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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 448

AARON PRUSSIAN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1930

CERTIORARI GRANTED OCTOBER 20, 1930

(35,370)

(35,370)

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IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff,

against

AARON PRUSSIAN, Defendant

STATEMENT UNDER RULE 13

This is an appeal by the defendant, Aaron Prussian, from a judgment of conviction in a case tried before the Honorable John E. Martineau, United States District Judge, sitting in and for the Eastern District of New York, and a jury.

The indictment herein was filed on the 26th day of February, 1929, and contained two counts. After pleading not guilty on the 11th day of March, 1929, defendant was released upon furnishing bail fixed by the Court at $3500. The first count of the indictment charged the defendant with falsely making, forging and altering a certain obligation of the United States, to wit: the endorsement on a draft for the payment of money for the purpose of obtaining and receiving from the Treasurer of the United States a sum of money, to wit: Nine thousand forty-four and 37/100 ($9,044.37) Dollars. The second count charged the defendant with the unlawful uttering of the said certain obligation.

[fol. 2] On the 6th day of August, 1929, the second count of the indictment was dismissed by the Court at the close of the entire case. The jury rendered a verdict of guilty on the first count. On the 7th day of August, 1929, the Court sentenced the defendant to pay a fine of $200 and stand committed and be imprisoned for five years at the Federal Penitentiary at Atlanta, Georgia. Notice of appeal and the order allowing the appeal were signed and entered on the 8th day of August, 1929. There has been no change of attorneys since this appeal was taken.

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

SIRS: Please take notice that the defendant, Aaron Prussian hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the judgment of conviction rendered against him on the 7th day of August, 1928, convicting him of falsely making, forging and altering a certain obligation of the United States, to wit: the [fol. 3] endorsement on a draft for payment of money for the purpose of obtaining and receiving from the Treasurer of the United States a sum of money, to wit: Nine thousand Forty-four and 37/100 ($9,044.37) Dollars.

Upon conviction of the foregoing the defendant was sentenced to Five years in Atlanta Penitentiary and to pay a fine of Two hundred dollars.

Defendant hereby appeals from the said judgment and conviction; from the order denying defendant's motion to set aside the verdict and for a new trial, and denying arrest of judgment and from each and every part of said judgment.

Dated August 8th, 1929.

Yours, &c., Harold L. Turk, Attorney for Defendant. Office & P. O. address: 26 Court Street, Borough of Brooklyn, City of New York.

To Howard W. Ameli, United States Attorney, Post Office Building, Brooklyn, New York; Percy G. B. Gilkes, Clerk of the U. S. District Court, Eastern District of New York.

The within appeal is hereby allowed.

Dated August 8th, 1929.

John E. Martineou, U. S. D. J.

[fol. 4] Citation, in usual form, omitted in printing.

[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes Aaron Prussian, the defendant above-named, by Harold L. Turk, his attorney, and makes the following assignment of errors which he avers occurred upon the trial of this action:

First. The Court erred in denying defendant's motion to dismiss the indictment against the defendant upon the ground that the same did not state a crime under the laws of the United States.

Second. The Court erred in overruling the defendant's demurrer to the indictment on the ground that the said indictment did not state a crime under the laws of the United States.

Third. The Court erred in denying defendant's motion made at the close of the Government's case to dismiss the indictment and discharge the defendant.

[fol. 6] Fourth. The Court erred in denying defendant's motion for the direction of a verdict of not guilty at the close of the entire case.

Fifth. The Court erred in denying the motion of the defendant to set aside the verdict of the jury and for a new trial.

Sixth. The Court erred in denying defendant's motion for an arrest of judgment.

Seventh. The Court erred in entering judgment and imposing sentence upon the verdict of guilty.

Eighth. The Court erred in overruling the defendant's objection to the admission in evidence of Government's Exhibit 3.

Ninth. The Court erred in denying defendant's request to charge that if the jury believed the testimony of the witness, Miller, to the effect that the power of attorney admitted in evidence as Government's Exhibit 3 did not in any way limit the power of attorney admitted in evidence

as Government's Exhibit 1 that they should find a verdict of not guilty.

Wherefore the defendant, Aaron Prussian prays that the aforesaid judgment may be reversed and that he have such other and further relief as may be just and proper in the premises.

Harold L. Turk, Attorney for Defendant. Office & P. O. address: 26 Court Street, Borough of Brooklyn, City of New York.

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER STAYING EXECUTION—Aug. 8, 1929

The above-named defendant, Aaron Prussian, in the above-entitled action, having duly served and filed a notice of appeal from a judgment of conviction, and the citation having been duly issued thereon, it is

Ordered that the defendant, Aaron Prussian be set at liberty by furnishing a security bond in the sum of Ten Thousand ($10,000) Dollars during the pendency of said appeal in said Circuit Court of Appeals in the Second Circuit and until the mandate of said Circuit Court of Appeals be issued on said appeal and an order of this Court entered thereon, and in the meantime all proceedings for the execution of the sentence be in all respects stayed, and [fol. 8] the execution of said sentence is hereby stayed until the final determination of the appeal herein by the Circuit Court of Appeals; and it is further

Ordered that the Warden or keeper of any penal institution in which the defendant herein, Aaron Prussian may be confined shall forthwith discharge the said defendant, Aaron Prussian from custody on the filing with him a copy of this order with proper evidence showing that the required bail has been duly given.

John. E. Martineau, U. S. D. J.

[fol. 9] IN UNITED STATES DISTRICT COURT

INDICTMENT.

LRH/LG

At a Stated Term of the District Court of the United States of America for the Eastern District of New York, begun and held in the Borough of Brooklyn, City of New York, within and for the District aforesaid, on the 7th day of February in the year of our Lord one thousand nine hundred and twenty-nine, and continued by adjournment to and including the 26th day of February in the year of our Lord one thousand nine hundred and twenty-nine.

EASTERN DISTRICT OF NEW YORK, ss:

The Grand Jurors of the United States of America, within and for the district aforesaid, on their oaths present that Aaron Prussian, hereinafter called the defendant, on or about the 6th day of April 1926, in the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York and within the jurisdiction of this Court, did then and there unlawfully, wilfully, knowingly and feloniously, falsely make, forge and alter a certain obligation of the United States, to wit: the endorsement on a draft for payment of money, for the purpose of obtaining [fol. 10] and receiving from the Treasurer of the United States, a sum of money, to wit: Nine thousand forty-four dollars and thirty-seven cents ($9,044.37), in the following manner, that is to say: that theretofore a certain draft for the payment of money, to wit: the sum of Nine thousand and forty-four dollars and thirty seven cents ($9,044.37), was drawn by an authorized officer of the United States, to wit: by one J. L. Summer, Disbursing Clerk of the United States Treasury, upon the Treasurer of the United States, to the order of Malcolm S. Mackay, Admr. Est. of Jennie E. Mackay, which said draft was an obligation of the United States and was in the words and figures following:

"Treasury, Washington, D. C. 784427

Mar. 19, 1926.

Treasurer of the United States

15-51

[SEAL.]

Pay to the Order of Malcolm S. Mackay, admr. est. of Jennie E. Mackay, $9,044.37, nine thousand forty-four 37/100 dollars.

Object for which drawn: Refunding taxes illegally collected.

N. P. 1-387. 14342."

J. L. Summer, Disbursing Clerk.

[fol. 11] and on the back of which said draft for money, were the words and figures following, to wit:

"Form approved by Comptroller of the Treasury January 27, 1913. This check must be indorsed in ink or indelible pencil on the line blow by the person in whose favor it is drawn and the name must be spelled exactly the same as it is on the face of the check. If endorsement is made by mark (X) it must be witnessed by two persons who write, giving their place of residence in full. (Signed) (Sign on this line) Malcolm S. Mackay, Admr. Est. of Jennie E. Mackay. Aaron Prussian, Atty. Aaron Prussian. Pay to the order of Bank of Coney Island. J. L. Buckman."

that the said draft for money was duly issued to the said, Malcolm S. Mackay, Admr. Est. of Jennie E. Mackay, and thereafter the defendant did unlawfully, wilfully, knowingly and feloniously obtain possession of said draft for money and did then and there falsely forge the endorsement of the said draft by falsely making and forging the [fol. 12] name of the payee, to wit: the words "Malcolm S. Mackay" on the back of said draft for money; that the said draft for money with the said forged endorsement thereon did together constitute a forged obligation of the United States as the defendant then and there well knew, with intent then and there and thereby to defraud, in violation of Title 18, United States Code, Sections 73 and 262; (Sec-

tions 29 and 148 U. S. C. C.); against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

Second Count

And the Grand Jurors aforesaid on their oaths aforesaid do further present that Aaron Prussian, hereinafter called the defendant, on or about the 6th day of April 1926, in the Borough of Brooklyn, County of Kings, City, State and Eastern District of New York and within the jurisdiction of this Court, did then and there unlawfully, wilfully, knowingly and feloniously pass, utter and publish to and upon one J. L. Buckman, a certain forged obligation of the United States, to wit: a draft for the payment of money which was drawn by an authorized officer of the United States, to wit: by one J. L. Summer, Disbursing Clerk of the United States Treasury, upon the Treasurer of the United States, to the order of Malcolm S. Mackay, Admr. Est. of Jennie E. Mackay, which said draft was an obli- [fol. 13] gation of the United States and was in the words and figures following:

"Treasury, Washington, D. C. 784427

Mar. 19, 1926.

Treasurer of the United States
15-51

[SEAL.]

Pay to the Order of Malcolm S. Mackay, admr. est. of Jennie E. Mackay, $9,044.37, nine thousand forty-four 37/100 dollars.

Object for which drawn: Refunding taxes illegally collected.

N.P. 1-387. 14342."

J. L. Summer, Disbursing Clerk.

and on the back of which said draft for money, were the words and figures following, to wit:

"Form approved by Comptroller of the Treasury January 27, 1913. This check must be endorsed in ink or indelible pencil on the line below by the person in whose favor it [fol. 14] is drawn and the name must be spelled exactly the

same as it is on the face of the check. If endorsement is made by mark (X) it must be witnessed by two persons who can write, giving their place of residence in full. (Signed) (Sign on this line) Malcolm S. Mackay, Admr. Est of Jennie E. Mackay. Aaron Prussian, Atty. Aaron Prussian. Pay to the order of Bank of Coney Island. J. L. Buckman."

he the said defendant, Aaron Prussian, did then and there well know the said endorsement, to wit: Malcolm S. Mackay, thereon, to be false and forged and with intent to utter the same as true and genuine and with intent then and there and thereby to defraud, against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided and especially contrary to Title 18, United States Code, Section 265.

William A. DeGroot, U. S. Attorney, Eastern District of New York.

[fol. 15] [Title omitted]

Title 18, United States Code, Sections 73, 262 and 265

Endorsements on Back of Indictment

Cr. 24140

1929.

Feb. 26th. Indictment filed.

March 4th. Bryant, J. Defendant not present; default noted; adjourned to March 18, 1929 for forfeiture.

March 11th. Campbell, J. Defendant arraigned. Plea not guilty with leave to withdraw same in 7 days to make such motions as may be required; Bail fixed at $3500. Ordered to return April 3, 1929.

April 3rd. Burrows, J.—Defendant present; ordered to return April 16, 1929.

13th. Notice of motion to dismiss indictment filed.

[fol. 16] 16th. Before Burrows, J.—Defendant present; ordered to return April 23rd 1929.

April 22nd. Before Burrows, J.—Hearing on motion to dismiss the motion argued—submit by April 24th 1929.

23rd. Burrows, J.—Def't present—Ordered to return May 8, 1929.

May 8th. Inch, J.—Def't present—Ordered to return May 27, 1929.

27th. Inch, J.—Def't not present—Case adjourned to June 10, 1929.

June 1st. By Burrows, J.—Order filed and entered denying motion to dismiss.

10th. Galson, J.—Def't not present—case adjourned to June 25th.

25th. Galston, J.—Def't not present—case adjourned to July 15th.

July 15th. Moscowitz, J.—Def't present; ordered to return July 29th.

29th. Moscowitz, J.—Def't present; ordered to return August 6th.

Aug. 6th. Before Martineau, J.—Def't present; trial ordered. Count 2 dismissed by Court. Jury rendered verdict of guilty. Def't remanded to Aug. 7th. 1929 for sentence.

7th. Before Martineau, J.—Def't present. Motion to set aside verdict denied. Def't sentenced to pay fine of $200. without costs and stand committed and to be imprisoned for 5 years on count 1 at Federal Penitentiary, At-

[fol. 17] lanta, Ga. without costs, on first count.

8th. Assignment of Errors and Citation filed.

8th. By Martineau, J.—Order filed and entered that def't be set at liberty during pendency of appeal on furnishing a surety bond for $10,000.

8th. Notice of appeal and allowance of appeal filed and entered.

8th. Bond for $10,000. filed.

Sept. 5th. By Inch, J.—Order filed and entered extending time to file Transcript of Record, etc., to October 15th 1929.

Oct. 11th. By Moscowitz, J.—Order filed and entered extending def'ts time to file Transcript of Record to Nov. 15, 1929, etc.

Nov. 14th. Campbell, J.—Order filed and entered extend- def'ts time to file transcript of Record to December 15th 1929.

Dec. 13th. By Byers, J.—Order filed and entered extending time of def't, Aaron Prussian, to file his transcript of record on appeal, etc. to January 15th 1930.

[fol. 18] In United States District Court, Eastern District of New York

The United States of America

vs.

Aaron Prussian

Bill of Exceptions

Before Hon. John E. Martineau, J., and a Jury

Brooklyn, N. Y., August 6, 1929.

Appearances of Counsel

Howard W. Ameli, Esq., United States Attorney, for the Government.

L. R. Henry, Esq., Assistant U. S. Attorney, of counsel.

Harold L. Turk, Esq., and William Berg, Esq., Attorneys for defendant.

A jury was examined, accepted and sworn.

The Court: You may state your case.

[fol. 19] Mr. Turk: May I ask that all witnesses except the witness testifying be excluded?

The Court: They may stay in court. I will let you cross-examine them if you wish.

Mr. Turk: Exception.

(Mr. Henry opened to the jury.)

(Mr. Turk opened to the jury.)

The Court: Call your witnesses.

John E. Miller, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Henry:

Q. What is your occupation?

A. Lawyer by profession, retired.

Q. Are you a member of the New York Bar?

A. A member of the New York Bar.

Q. How long have you been a member of the New York Bar?

A. I was admitted in 1874.

Q. That is over fifty years, and you have been a lawyer in New York?

A. Yes.

Q. Were you the lawyer for the Jennie E. Mackay Estate?

A. I was the attorney for Mrs. Mackay's estate.

Q. Do you know Clarence E. Mackay?

A. Malcolm S. Mackay.

Q. Malcolm S. Mackay I mean.

A. Yes.

Q. Was he the administrator to the will annexed of the Jennie Mackay Estate?

A. Yes.

Q. Did the Jennie E. Mackay Estate pay certain taxes to the United States Government after the estate was settled, or during the settlement of the estate?

[fol. 20] A. During the settlement of the estate, yes.

Q. Do you know how much they paid the Government?

A. In this particular case with principal and interest it amounted to about $9,000.

Q. You are not a tax lawyer as a specialty, are you?

A. No.

Q. You do not practice that specialty at all?

A. No.

Q. And in the course of your representing the Jennie E. Mackay Estate did you consider taking up the question of the refund by the United States Government of an overpayment of taxes or something like that?

A. I knew nothing of this matter of refund until it was brought to my attention.

Q. After it was brought to your attention did you negotiate with any particular firm of tax counsel?

A. Yes.

Q. Whom did you negotiate with?

A. Kay & Kay of Washington, attorneys, and Aaron Prussian, associated together, at New York.

Q. Did you talk with one of the firm of Kay & Kay, together with Aaron Prussian?

A. They called on me inquiring if I represented the Mackay Estate.

Q. When you say they, you mean who?

A. Aaron Prussian and Mr. Morris Kay of the firm of Kay & Kay.

Q. Will you please tell us when they called on you for the first time?

A. October 1924.

Q. And was that in your office in New York?

A. At my office at that time.

Q. Did you have any conversation at that time with the defendant, Mr. Prussian?

A. Yes, with Mr. Kay together.

[fol. 21] Q. And was Mr. Prussian there during all the conversation between Mr. Kay and yourself?

A. Yes.

Q. Just tell us what you said and what Mr. Prussian said as near as you can remember the conversation?

A. Morris Kay and Aaron Prussian called on me.

Mr. Turk: I am sorry to interrupt.

The Court: You will have to speak a little louder.

The Witness: Morris Kay and Aaron Prussian called on me at my office inquiring if I represented the Mackay Estate, and being informed in the affirmative, said that the Mackay Estate had a claim against the Government for overpayment of taxes. They introduced themselves by handing me their card, Aaron Prussian's card, and Morris Kay's card, stating that they were associated together. Mr. Kay gave me references, which I jotted down, on the card. I think the Forrest Brothers and the Wickersham firm were among them. I told them that I would have to inquire properly into the merit of the matter. They had three or four claims for refund of State taxes, inheritance taxes, in New Jersey, and this particular refund, and Government taxes. I was very busy. They told me their terms, which were perfectly satisfactory, and I was very busy, and I did not have time to look into it, and I told them that I

would look very carefully into it before employing them, [fol. 22] and if I found the claims were meritorious I would employ them. I looked into it, I received a letter from Kay & Kay with reference to the case and the merits of it, and also communications from Mr. Prussian. Later on I received a letter advising me that the time was running out, and that on the 15th of March the Statute of Limitations would run. I examined their references and found them satisfactory as to Kay & Kay, and informed him that he would be employed, and to bring around the papers.

Q. You did not investigate Mr. Prussian's references at all, did you?

A. I had no references given to me by Mr. Prussian. They were all by Mr. Kay.

Q. Just tell us what was the next step?

A. I insisted upon filing this claim that a letter should accompany it to the effect that if by any chance it had been allowed or credited by the Government previously, the claim should be disallowed and fall by itself. Mr. Prussian brought around the papers for execution and when he brought them to me there was a little claim, the method of computation of taxes in the estate of Duncan Mackay, deceased, a brother of Malcolm S. Mackay. The ruling of the Department had been changed after the taxes had been paid, and I told him, "You might just as well collect this at the same time." That first claim amounted to about $1700, merely a computation of interest, and the figures. The papers were executed, a power authorizing them to appear at the Internal Revenue Department, and likewise the office [fol. 23] of the Collector of Internal Revenue in New Jersey, which is absolutely necessary before you can get any refund. That was the customary thing.

Mr. Turk: I ask that the last part be stricken out as a conclusion on the part of the witness.

The Court: Strike it out.

Q. Go ahead. Please tell us what happened. You mentioned a power of attorney being given to Aaron Prussian.

A. He brought around the papers, the proof of claim, the power of attorney, and contract of employment.

Q. I show you this copy here, bearing the seal of the Treasury Department, and ask you if that is a copy of the

power of attorney which you mentioned in your testimony (hands paper to witness)?

A. Yes.

Q. And Mr. Mackay executed that, did he, if you know?

A. Yes.

Mr. Henry: I will offer this in evidence.

(The paper in question is received in evidence and marked Government Exhibit No. 1.)

Q. Did you see Mr. Prussian again after that time in reference to this claim?

A. Yes.

Q. About when was that, if you can remember, Mr. Miller?

A. It was a number of times, sometimes he would want additional papers, certificates, or ask for some information.

Q. Did you see him just before the claim was allowed or just after the claim was allowed?

A. Yes; not just before the claim was allowed. Some [fol. 24] time before the claim was allowed he wrote to me that the claim would be allowed, but there was no money paid.

Q. After that did you see him again?

A. Yes.

Q. In reference to getting the draft?

A. Not in reference to getting the draft, because I did not know that he ever had received the draft.

Q. Have you got that letter in which he said that the claim was allowed, that you received from him?

A. I don't think I have it. I have been looking for it very carefully and I could not find it, but I think I can find it if you give me the time.

Q. Is this the letter to which you refer (handing a letter to the witness)?

A. No; this is not the letter I referred to. It was a letter I received from him.

Q. That is another letter you received from him?

A. Yes.

Q. At any rate, did you prepare another power of attorney from Mr. Mackay to Prussian?

A. This letter I received requests an authorization—do you want his letter read?

The Court: Do you want that letter read, Mr. Henry?
Mr. Henry: Let me see it first.

Q. Did you prepare another power of attorney from Mr. Mackay to Aaron Prussian at any time after that?
A. Another power of attorney was given to Aaron Prussion authorizing him to receive——

Mr. Turk: I object to anything contained in it because it speaks for itself.

[fol. 25] Q. Did you prepare that?
A. No; I did not prepare it.
Q. Did you ever receive the refund from the United States Government?
A. No; not in the Jennie Mackay estate.
Q. Did the Jennie Mackay estate ever receive that refund from anybody?
A. No.
Q. You still have charge of the estate, have you not?
A. I retired from practice but I am still helping Mr. Mackay. The estate that I settled long ago.
Q. Did the estate ever receive that money from anybody?
A. No.
Q. I show you this draft here, and I ask you if you ever received that (hands a paper to witness)?
A. Oh, this is the check. No.

Mr. Henry: I will ask that that be marked for identification as Government Exhibit No. 2.

(The paper in question is marked Government Exhibit No. 2 for identification.)

Q. I show you this paper and ask you if you have seen that paper before, Mr. Miller (hands a paper to witness)?
A. Yes.
Q. Where did you first see it?
A. It was given to me by Mr. Prussian to have Mr. Mackay execute it.
Q. Did Mr. Mackay execute it? Do you know?
A. Yes.
Q. That is Mr. Mackay's signature at the bottom of it?
A. Yes.
Q. Then did you give it back to Mr. Prussian after that?
A. It was given to Mr. Prussian.

[fol. 26] Q. What is that?

A. And given by me to Mr. Prussian.

Q. You gave it back to him?

A. Yes.

Mr. Henry: I offer this paper in evidence as Government Exhibit No. 3.

(The paper in question is received in evidence and marked Government Exhibit No. 3.)

Mr. Turk: I object to the introduction of this power of attorney in evidence on the ground that it is signed by Malcolm E. Mackay, and not as Malcolm Mackay, not by Malcolm E. Mackay as administrator of the estate of Jennie E. Mackay.

The Court: The objection will be overruled. Do you want to read that, Mr. Henry?

Mr. Henry: I would like to read it in order to get the proof in chronological order.

(Mr. Henry reads Government Exhibit 3 to the jury and also Government Exhibit No. 1.)

Q. Referring to Government Exhibit No. 3, this second power of attorney, Mr. Miller, you said you delivered this to Mr. Prussian after Mr. Mackay had signed it?

A. Yes, after he executed it.

Q. But you did not draw the instrument yourself?

A. Mr. Prussian drew the instrument.

Mr. Henry: That is all.

[fol. 27] Cross-examination.

By Mr. Turk:

Q. Mr. Miller, the defendant Prussian was retained by the Mackay Estate by a written agreement, was he not?

A. An authorization, yes.

Q. I show you this paper and ask you whether this is a copy of the agreement retaining the defendant to act as attorney before the Tax Department (hands the witness a paper)?

A. Yes.

Mr. Turk: May I ask the Government to produce the original of that agreement?

Mr. Henry: What is the date of it?

Mr. Turk: The top is marked agreement. Will you let me have that please?

Q. Have you the original of that agreement in your possession?

A. No, because it had to be filed.

Q. I am speaking now of the original agreement and not the power of attorney.

A. No, because that was given to Mr. Prussian.

The Court: He admits that that is a copy of it.

Mr. Turk: I offer this in evidence.

(The paper in question is received in evidence and marked Defendant's Exhibit A.)

Q. Was this agreement signed by Mr. Mackay in your presence, that is, the retainer agreement?

A. Yes.

Q. And do you recall without refreshing your recollection by looking at this paper who Mr. Mackay retained under [fol. 28] this agreement, this written agreement to represent him before the Treasury Department?

A. Kay & Kay and Aaron Prussian.

Q. Are you sure of that?

A. The contract of employment was made with Kay & Kay and Aaron Prussian.

Q. I ask you whether you know without refreshing your recollection by looking at this paper here, this agreement, who Mr. Mackay retained to represent him before the Treasury Department?

A. The agreement designated Mr. Aaron Prussian to appear as attorney.

Q. That is all I asked you? Was there a written retainer agreement retaining this defendant Prussian to appear for the Mackay Estate, or to appear for Mr. Mackay in the Malcolm Mackay Estate?

A. There was an agreement with Mr. Prussian the same as this.

Q. That was by written agreement?

A. Written agreement.

Q. In the Duncan Mackay Estate Mr. Mackay agreed to give to Mr. Prussian a fee equal to 15 per cent of any amount recovered? Is that correct?

A. The agreement designated him. Yes.

Q. And at the same time that these retainers were given to Mr. Prussian Mr. Mackay executed the first power of attorney you referred to in your direct testimony?

A. Yes.

Q. I show you this paper marked agreement and ask you whether that is a retainer in the Duncan Mackay Estate (hands a paper to witness).

A. Yes.

Q. What is the percentage agreed upon in that agreement?

A. 15 per cent. unless——

[fol. 29] Mr. Turk: I offer that paper in evidence.

(The paper in question is received in evidence and marked Defendant's Exhibit B.)

Q. Mr. Miller, Mr. Prussian prepared these papers filing the claim for refunds in both of these estates, did he not?

A. The papers were brought to me by Mr. Prussian.

Q. Do you say now that you do not know who prepared those papers?

A. I would not say that.

Q. Do you remember testifying in this case once before?

(No answer.)

Q. Do you?

A. In New York here?

Q. Yes.

A. Yes.

Q. Do you remember testifying in New York that Mr. Prussian prepared all the papers?

A. He brought all the papers to me and I presume——

Q. You are not answering my question. I asked you whether you remembered testifying that Mr. Prussian prepared all of those papers?

A. I do not remember testifying to that but I assumed he did.

Q. Now, at the same time that you gave Mr. Prussian the power of attorney and the retainer in both of these estates you also gave him a letter addressed to the Treasury Department, did you not?

A. In the Jennie E. Mackay Estate.

Q. Pardon me.

A. In the Estate of Jennie E. Mackay.

Mr. Turk: Mr. Henry, will you let me see the minutes.

(Mr. Henry hands papers to Mr. Turk.)

[fol. 30] Q. Mr. Miller, Mr. Mackay received a check direct in the Duncan Mackay Estate, did he not?

A. Yes.

Q. Do you know whether Mr. Mackay ever sent the 15 per cent. of that check to Mr. Prussian-

A. No.

Q. When you say no you mean he did not send it?

A. He did not send it.

Q. As far as you know Mr. Prussian was not paid for his services in the Duncan Mackay Estate, was he?

A. Because——

Q. As far as you know?

A. Because he had collected——

Q. I am not asking you the reason. I am simply asking you as far as you know whether Mr. Prussian was paid for his services in the Duncan Mackay Estate?

A. No. That is perfectly true.

Q. Now, do you remember the circumstances concerning the second power of attorney to which you referred in your direct examination?

A. Yes.

Q. Now do you remember testifying with respect to that second power of attorney in New York before Judge Bondy?

A. I remember testifying before to that.

Q. Do you remember testifying, do you remember this question by Judge Bondy addressed to you "Did you give him Exhibit 2 (that is the second power of attorney) to limit Exhibit B (the first power of attorney)?"

A. I don't remember it.

Q. Do you remember your answer, "No, because the Government would not give him the check." In other words, do you remember your testimony in New York to [fol. 31] the effect that the second power of attorney was not intended to limit the first power of attorney? I am simply asking you whether you remember that testimony.

A. It had nothing to do with the first power of attorney. The second power of attorney was given to Mr. Prussian so that he could receive the check which they refused to give him at the Internal Revenue Office.

Mr. Turk: I ask that that answer be stricken out as not responsive to my question.

The Court: You can ask him now if he contradicts his former testimony, and you can direct him to that testimony.

Q. Will you say now that you do not recall that testimony before Judge Bondy?

A. I don't.

Q. Will you say now you did not so testify before Judge Bondy?

The Court: He has not testified here at all. You can ask him here, and if he contradicts himself you can bring that testimony before him.

Q. Did you give this second power of attorney marked Exhibit 2 for the purpose of limiting this first power of attorney?

A. No. I gave him that to collect the check.

Q. I see, and there was no intention of limiting the first power of attorney by that second power of attorney?

A. What?

Q. There was no intention of limiting the first power of attorney by that second power of attorney?

A. No.

[fol. 32] Q. Let me ask you this. You heard the conversations between Mr. Prussian and Mr. Catanella in New York?

A. A number of them.

Q. And you heard Mr. Prussian tell Mr. Catanella in the District Attorney's office that he had the right and authority to endorse that check?

A. I heard him tell him that he thought he had the right.

Q. Mr. Prussian notified you on several occasions that the Government had allowed the claim for refund? Is that not a fact?

A. He notified me that the Government had allowed the claim for refund in the Jennie E. Mackay Estate, but there was no appropriation of money to pay for it.

Q. But during the pendency of the proceeding at Washington Mr. Prussian kept you continuously informed as to the progress that was being made in that case, is that not a fact?

A. He told me yes, several times the progress that was being made in the case.

Q. I show you a copy of a letter dated January 22, 1926, and ask you whether you ever saw the original of that letter (hands paper to witness)?

A. I think I have it here.

Q. Will you produce it here?

A. If I have it. Yes. I have it here.

Q. May I see it, Mr. Miller?

(The witness produces a paper.)

Q. You received this letter from Mr. Prussian in the ordinary course of business, did you not?

A. I received that letter.

Mr. Turk: I offer it in evidence.

[fol. 33] Mr. Henry: May I see it, Mr. Turk?

(Mr. Turk hands paper to Mr. Henry.)

Mr. Henry: No objection.

(The paper in question is received in evidence and marked Defendant's Exhibit C.)

Q. I show you a *letter* of a letter dated April 2, 1926, purporting to be sent to you by Mr. Prussian and ask you whether you have the original of that letter? Pardon me, Mr. Miller, I have the original of that letter here. It was on the District Attorney's table. I show you this letter and ask you whether this is the letter that you received from the defendant with respect to the Jennie Mackay Estate?

A. Yes.

Q. There is not any reference in that letter to any request for a power of attorney is there?

A. Pardon me?

The Court: You might just as well read those letters, Mr. Witness.

The Witness: It does not speak of a power of attorney. It speaks of a blank to be sent to Mr. Mackay for execution.

Q. Did that blank with that letter refer to any outstanding income tax liability?

A. That was a paper which we executed enabling him to get the check.

Q. You say the letter referred to that?

A. No; I say this letter is just previous to it.

Mr. Turk: I ask that that be stricken out as not responsive to my question.

[fol. 34] The Court: You had better read the letter.

(Mr. Turk reads to the jury Defendant's Exhibits A, B and C, and also Defendant's Exhibit D.)

Q. Do you remember telling Mr. Prussian that that check for refund in the Jennie Mackay Estate should be made payable to Mr. Prussian and Kay & Kay?

A. I told Mr. Prussian——

Q. Please answer the question yes or no. Do you remember telling him that?

A. Yes. I told him that the check for the fee should be paid to the joint order.

Q. I don't wish to interrupt you, Mr. Miller, but I asked you——

The Court: He has a right to answer your question and make proper explanations of it.

The Witness: I told Mr. Prussian that the payment of the fee should be made to the joint order of Kay & Kay and Aaron Prussian.

Q. Do you also remember saying that you would not discuss the question of Mr. Prussian's fee until the entire check was turned over to him?

A. No. I did not.

Q. You say now that you never made any such statement?

A. No.

Q. You are sure of that, are you?

(No answer.)

Q. Are you sure of that, are you?

A. I think so to the best of my knowledge.

Q. Did you not ever insist upon having the entire check turned over to you before you would discuss the question of Prussian's fee?

[fol. 35] Mr. Henry: The question was, was there any such question raised in reference to Kay & Kay and Prussian, and now he talks of Prussian's fee. I object as to form.

The Court: He can ask the question.

Q. Let me make this clear. You wanted the entire check before you would discuss the question of fee in the case. Is it not a fact?

A. Yes, because it was payable to the order apparently of Malcolm S. Mackay as administrator.

Q. You did not want to discuss the proposition of Prussian's fee at all, did you?

Mr. Henry: I ask that the question be so framed as to fix the time.

The Court: Why do you want to go into that?

Mr. Turk: I want to bring out the fact that Prussian never had been paid for the Duncan Mackay Estate, and held that check for the purpose of adjusting his fee. Under the first power of attorney which was on file at Washington, and which was not intended to be limited by the second power of attorney, Prussian had the right to make arrangement with respect to his fee and deduct it from that check.

The Court: The question is did he have authority to sign it.

Mr. Turk: I think we will be able to convince your Honor that he did.

The Court: That is the issue you have here.

[fol. 36] Q. Did you want to give Prussian the 25 per cent that he was entitled to as his retainer out of the Jennie Mackay Estate?

A. No.

Q. Yes or no.

A. I could not.

Q. Yes or no.

The Court: I am going to exclude that. You can take your exception on that. I am not going to let you inquire as to whether a dispute arose between Mr. Miller and Mr. Prussian as to how his fee should be paid. The only question is whether Prussian had Mackay's authority to sign his name to this warrant or check.

Mr. Turk: I respectfully except.

Mr. Henry: I offer this check in evidence, as Government Exhibit No. 2.

(Mr. Turk reads the check to the jury.)

Q. Mr. Miller, Mr. Prussian never denied any of the facts to you, did he?

(No answer.)

Q. I mean he always gave you the information as the case went on?

A. Yes; he kept me posted up to the time that he collected the check.

Q. And never in your presence did he deny having signed the name of Malcolm S. Mackay?

A. I never heard him deny signing it.

Q. As a matter of fact he always said that he signed it, and that he had a right to do so?

A. That was in Mr. Catanella's presence.

Mr. Turk: That is all.

[fol. 37] Redirect examination.

By Mr. Henry:

Q. When did you first find out that Mr. Prussian had endorsed this check, which is Government Exhibit No 2?

A. I did not find that out, that he had received the check at all until six months after he had it.

Q. He did not keep you posted about that during that six months, did he?

A. No.

Q. He did not tell you that he had collected the check from the Collector of Internal Revenue until six months later?

A. No. I discovered that by accident.

Q. Did Prussian ever tell you he got the check from the Collector of Internal Revenue?

A. No; he never told me.

Q. Did he ever tell you about signing Mackay's name on the check?

A. He made the statement that he had a right to do it.

Q. When did he make that statement?

A. The statement as I remember was made when he was before Mr. Catanella in New York.

Q. He was the Assistant United States Attorney in New York?

A. Yes.

Q. In the United States Attorney's office he made that statement?

A. Yes.

Q. But he did not write you a letter at the time he received that check telling you that he had received it or that he had endorsed Mr. Mackay's name on the back of it, did he?

A. No.

Mr. Henry: That is all.

[fol. 38] Recross-examination.

By Mr. Turk:

Q. You testified that you gave Prussian that second power of attorney so that he could go to Newark, the Collector's office, and get the check?

A. Yes.

Q. You knew that the check was in the Collector's office?

A. Yes, but I did not know that he received it.

Q. But you knew that he went over there to get it, did you not?

A. I presumed so.

Q. As a matter of fact, did not Prussian talk to you upon receipt of this check by him with reference to the fees that he was entitled to in the Duncan Mackay and the Jennie Mackay Estates?

A. No. Never.

Q. When was the last time prior to meeting Mr. Prussian in Court that you heard from Mr. Prussian with respect to that check?

A. I never heard from him about the check. The last time I saw Mr. Prussian. Was that the question?—Was when I delivered the power of attorney for him to go over and receive it.

Q. Is it not a fact that Prussian told you that he had the check?

A. No.

Q. Just a moment, just a moment, and is it not a matter of fact that you wanted Prussian to adjust the differences with Kay & Kay at Washington before you would pay him his fee out of the Mackay Estate?

A. No.

Q. Would you say that there was no difference between you and Kay & Kay of Washington with reference to the fee in the case?

A. Kay & Kay had notified me if I paid the entire fee to Mr. Prussian they would hold Mr. Mackay liable on a quantum meruit for services rendered.

[fol. 39] Q. Exactly, and that was the reason you did not want to pay Prussian his fee. Is that not a fact?

A. That is the reason ——

Q. May I get an answer.

The Court: He has answered.

The Witness: That is the reason why the check would be drawn to the joint order of Kay & Kay and Aaron Prussian.

Q. You say there was a dispute with respect to the fee claimed by Kay & Kay?

A. Yes.

Q. Did you hear from Kay & Kay after Mr. Prussian went to the Newark Collector's office?

A. No.

Q. Did not Kay & Kay write you or telephone you demanding the fee from you as to the Jennie Mackay Estate?

A. They did not know the check had been received. Nor did I.

Q. You say you did not hear from them?

A. I heard from them before the check was paid.

Q. Did you hear from them after the check was paid?

A. No.

Q. Then you don't know whether they knew that the check had been paid or not, do you?

A. I had not any knowledge.

Q. Then why did you say that they did?

Mr. Henry: I object to the form of the question.

The Witness: I don't follow.

Mr. Turk: I will withdraw it.

Mr. Turk: That is all.

[fol. 40] By Mr. Henry:

Q. In other words, Mr. Miller, Kay & Kay and Mr. Prussian all wanted the fee, and you did not care which one got it, and that is why you wanted the check made out to all three of them?

Mr. Turk: I object to the question as to form
The Court: Overruled.
Mr. Turk: Exception.

Q. And that is why you wanted the check made out to the three of them?

Mr. Turk: I object to the question as being incompetent, irrelevant and immaterial and also as leading.
The Court: Overruled.
Mr. Turk: I respectfully except.

Q. Is that right?
A. I wanted to pay the fees to both of them and to be relieved from all responsibility or liability to either.
Q. Then you would not be in danger of paying the wrong party?

Mr. Turk: I object to the form of the question.
Mr. Henry: I will withdraw it. That is all.

By Mr. Turk:

Q. Was there a written retainer in the case retaining Kay & Kay?
A. No.
[fol. 41] Q. But there was a written retainer retaining Aaron Prussian?
A. He acted as the representative in the matter.
Q. I asked you whether there was a written retainer retaining Aaron Prussian?
A. Yes.
Q. And was there a written retainer retaining Kay & Kay?
A. No; verbal agreement.

Mr. Turk: That is all.

By Mr. Henry:

Q. When you made this verbal agreement were Morris Kay and Aaron Prussian both there?
A. Yes.

Mr. Turk: I object to that on the ground that it is oral tending to vary the terms of a written instrument.
The Court: Overruled.
Mr. Turk: I respectfully except.

Q. Was Aaron Prussian associated with Kay & Kay at that time when you first retained Kay & Kay?

A. Yes; the correspondence also proves it.

Q. Have you any of that correspondence here?

The Court: I don't think that that is material.

Mr. Henry: I will withdraw it. That is all.

Mr. Turk: May I ask that the latter part of the witness's answer be stricken from the record?

The Court: It is immaterial as far as this case is concerned.

[fol. 42] By Mr. Henry:

Q. Were you sworn as a witness before you testified here today?

A. Why, I stood up here in front with all the others and was sworn.

Q. I wanted that to appear on the record.

The Court: It does not have to appear on the record.

Mr. Henry: That is all.

John L. Sullivan, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Henry:

Q. What is your occupation?

A. United States Secret Service Operator.

Q. How long have you been in the United States Secret Service?

A. Since 1916.

Q. You have seen Aaron Prussian before, have you not?

A. Yes.

Q. When did you first see him, about, the date? Can you remember?

A. About the first of January, 1927.

Q. Were you directed to investigate this case?

A. I was.

Q. Did you have any conversation with Mr. Prussian on that first occasion?

A. Yes.

Q. What did you say to him and what did he say to you as near as you can remember?

A. Well, I explained the reason for my investigation of Mr. Prussian, and showed him the check, and also the affi- [fol. 43] davit as filed by the administrator of that estate, Malcolm S. Mackay, and he claimed at that time that he was within his rights in withholding and using the check until his differences were adjusted by the administrator.

Q. Did he say using it?

A. Using it.

Q. I show you Government Exhibit No. 2 (hands a paper to witness). Is that the check that you referred to?

A. That is the check.

Q. Did you at that time or subsequently have Mr. Prussian write out a statement and sign it and give it to you in regard to this case?

A. Yes.

Q. I show you this piece of paper and ask you to tell the Court and jury the circumstances, what the circumstances were, and the conservation as near as you can remember it leading up to Prussian's signing that statement?

A. Prussian and I had had several interviews concerning this check, and I asked him to put it in writing, and he prepared this form, and signed it.

Q. In your presence?

A. In my presence.

Mr. Henry: I offer that in evidence.

Mr. Turk: No objection.

(The paper in question is received in evidence and marked Government Exhibit No. 4.)

Q. Did you have any further conversation with Prussian at any time with regard to this case?

A. At that time Mr. Prussian claimed that he was willing to make restitution in the amount of the check.

Q. To whom?

A. To the Government or to the estate, and before I ar- [fol. 44] rested Mr. Prussian or took him into custody, I gave him an allowance of about two or three weeks, so that he might be able to gather this money together, but he failed to do it, and I submitted the matter to the United States Attorney for the Southern District of New York.

That was in view of the fact that Mr. Prussian acknowledged that he went to Newark, and got that check, and brought it to his office in New York, and endorsed it in New York.

Q. And so if he endorsed it in New York you thought that jurisdiction would lie in New York?

Mr. Turk: I object to that question.

Q. He told you that he had endorsed this check, Government Exhibit 2, in New York, in his office?

A. That is what he told me.

(Mr. Henry reads Government Exhibit No. 4 to the jury.)

Q. Did Mr. Prussian ever make any explanation why he was not able to make this restitution? What did he say about restitution?

A. He said he was not able to raise the amount of money at that time.

Mr. Henry: Your witness.

Cross-examination.

By Mr. Turk:

Q. Did Mr. Prussian use the word restitution to you?

A. I believe so.

Q. Are you sure that he did, or is that the conclusion that you drew from what he said to you?

A. That might be my own conclusion. Yes.

[fol. 45] Q. In other words, you say that the word restitution might be your conclusion from what he said to you at the time?

A. That was our conversation as regards restitution for the check.

Q. When you asked Mr. Prussian for a statement with reference to that check he gave it to you willingly, did he not?

A. He did.

Q. Very willingly?

A. Yes.

Q. He did not deny any of the facts in the case to you, did he?

A. No.

Q. And you had absolutely no trouble in getting him to give you a complete statement of the facts?

A. No; he gave them willingly.

Q. Do you remember seeing this defendant Prussian with approximately $7,500 in certified checks in his pocket?

Mr. Henry: I object to that as being immaterial.

Mr. Turk: It is very material.

The Court: The objection is overruled.

The Witness: No.

Q. Do you remember seeing this defendant in possession of any certified checks?

A. No. Well he did not have possession of the checks. The lawyer had possession of the checks. I can't recall the lawyer's name.

Q. Do you remember the amount of those checks?

A. He had some checks which he claimed were 35 checks, and the total amount was $7,500.

Q. In other words, the amount was the total amount which Prussian claimed was due the Mackay Estate?

A. That is what he represented to Judge Goddard.

[fol. 46] Q. It is not a fact that Mr. Miller as representative for the Mackay Estate refused to accept anything less than the full amount of the check?

A. No. The facts were submitted to Federal Judge Goddard and he passed on them. He offered to pay the amount provided the case was dismissed and Judge Goddard refused.

Q. Do you remember a conversation at which Mr. Miller said that he would not have any discussion with the Judge or the District Attorney or anyone else unless the full amount of the check was paid?

A. No. He said that it was in the hands of the United States Attorney at that time. That was two years after.

Q. Do you remember any conversation in which Mr. Miller said that?

A. There was a conversation to that effect.

Q. Did you hear Prussian say that there was a fee coming to him and he wanted payment of his fee?

A. Well, a lawyer representing Prussian at that time made such a statement.

Q. Do you say now that you did not hear Prussian make that statement?

A. Yes; I did not hear Prussian make that statement.

Q. Pardon me.

A. Yes; I did not hear Prussian make that statement.

The Court: He says he heard a lawyer who represented him make that statement.

Q. Do you remember your testimony before Judge Bondy in New York?

A. I remember some of it.

Q. Do you remember this question: "Did you ever hear Mr. Prussian say since you first met him, Mr. Prussian, that he wanted his money?"

[fol. 47] "A. I heard him say he wanted his money." Do you remember saying that?

A. Yes.

Q. Do you remember this question and answer: "Did you not hear him say that he wanted his money? A. Yes, sir." Do you remember that now?

A. Yes, sir.

Q. Does that serve to refresh your recollection?

A. Yes.

Q. So that you did hear Prussian make the statement that he wanted his money. Is that right? (No answer.)

Q. Do you remember this question by the Court: "How many times did you hear him say it?

A. Probably two or three times." Does that serve to refresh your recollection?

A. Well, he has made that statement at every conversation I had with him, that he wanted to be paid his fees.

Q. He said that the very first time you met him, did he not?

A. Yes.

Q. Do you remember this question by the Court: "Did you ever hear anybody say that Mr. Miller would not let him take his money?" and you answered "I learned from Mr. Miller that he had written a letter as to the differences between him and Kay & Kay who were supposed to be associated with Mr. Prussian, and as soon as they had adjusted their differences he would be able to comply with the terms of the contract. That is what he told me." Do you recall that testimony?

A. Yes.

Q. Do you remember this question, Mr. Sullivan: "Did you hear Mr. Miller say in the hallway in your presence that he wanted the entire amount of the check?

A. What conversation was that?

A. A general conversation."

Mr. Turk: I withdraw that last part.

[fol. 48] Q. Here is a question put to you by Mr. Catanella, the Assistant District Attorney: "A question has been put to you that Mr. Miller asked for $10,000. Is it not a fact that Mr. Miller during the period that this case has been on the calendar, and during the time that Mr. Prussian has made offers to the Government to repay this money, is it not a fact that Mr. Miller said the amount of the check was $9,044.37, and until the defendant would produce that amount he could not entertain any discussion, either yourself, the Government, or the Judge," and your answer was yes. Do you remember that question and answer?

A. If it is in the minutes of the Court it must be so.

Q. Do you recollect your testimony?

A. I can't recall it.

Q. Would you say that you did not so testify before Judge Bondy?

A. No; I would not say that I did not testify to that. I must have testified to that.

Q. So that you testified in New York about Prussian making offers to Miller of the amount due the Mackay Estate, and that Miller would not take the offer of Prussian unless he got the full amount of the check? Is not that a fact?

A. No: Mr. Miller had no authority to make any agreement with Mr. Prussian, because it was in the hands of the United States Attorney at that time, and it was before that trial that they brought up that discussion about this.

Q. I asked you whether or not that testimony did not indicate that Prussian had made offers to Miller, and that Miller would not take anything except the full amount of the check. Is not that the substance of that conversation?

A. Yes.

Mr. Turk: That is all.

[fol. 49] Redirect examination.

By Mr. Henry:

Q. These various offers of payment were made after charges had been preferred against the defendant, were they not?

A. After the defendant was indicted.

Q. They were made with the idea of quashing the indictment, were they not?

A. Yes, sir.

Mr. Turk: I object to the form of the question and move that it be stricken out.

The Court: The objection is overruled.

Mr. Turk: Exception.

Mr. Henry: That is all.

Recross-examination.

By Mr. Turk:

Q. You spoke to Prussian prior to his indictment?

A. Prior to his indictment?

Q. Did you?

A. Yes.

Q. And he told you prior to his indictment that he thought he had a right to endorse that check?

A. I believe he said something like that, that he thought he was within his rights.

Q. Did he not say it in that written statement that you took?

A. Yes.

Q. Why do you say you believe? He said it, did he not?

A. Well, he said it.

Q. You did not have Prussian write anything in this statement about where the check was endorsed, did you?

A. No; I left that to himself. He made that statement himself.

Q. You wanted a complete statement of the facts, did you not?

A. I did not dictate it.

[fol. 50] Q. I say that you wanted a full and complete statement of the facts, did you not?

A. I asked him to give them to me.

Q. You are a Secret Service Operator?

A. Yes.

Q. Did you not think it was important to have Prussian write in that statement where that check was endorsed?

A. No; it was not necessary. I could not compel him to do that if he did not want to do it.

Q. You did not think it was necessary to find out where that check was endorsed?

A. I did not have any authority to compel him to put it in that statement. I asked him to give me a statement on the facts when I spoke to him.

Q. And you said he was very willing to give you the statement?

A. Yes.

The Court: He has answered your question. There is no use going into it any further.

Q. Did you not think it was important to find out?

The Court: It does not make any difference whether it was important or not. He has answered your question, that he did not think it was material, what was left out.

Q. After receiving this statement from Mr. Prussian did you discuss the facts of the case with Mr. Miller or with Mr. Mackay?

A. I did not.

Q. You spoke to them about the case, did you not? Before whom did you discuss that statement?

A. With the United States Attorney, Mr. Catanella, in the Second District.

[fol. 51] Q. Did Mr. Miller or Mr. Mackay in your presence ever deny any of the things that Prussian said about this case?

A. Not to me.

Mr. Turk: That is all.

By Mr. Henry:

Q. Did you ask them anything about it? What Prussian said?

A. I did not ask them anything. I went up to the United States Attorney after I produced this man before——

Q. Before Judge, did you go before Judge Goddard with Mr. Miller in the Southern District?

A. I did.

Q. Was that in reference to making a refund?

A. It was.

Q. In other words, Mr. Prussian offered, did he, to return this money?

A. Through this attorney. I understood at that time that this attorney represented his brother in Detroit, that this was his brother's money in Detroit, that this was his brother's money in Detroit.

Q. Did you go before Judge Goddard to take it up?

A. Yes.

Q. Was the defendant there?

A. The defendant was there.

Q. Do you remember what was said by the Judge to the defendant, and what the defendant said, and what was said by those present to the defendant, and what the defendant said?

A. I recall that his lawyer made this statement, that he wanted some sort of an agreement that if they made this refund of $7500 the indictment should be quashed, and when the Judge would not agree to that he would not agree to make the refund.

[fol. 52] Q. Was Mr. Miller there?

A. Yes.

Q. And the Judge would not consent to allowing any such agreement to be made?

A. He would not.

Mr. Henry: That is all.

By Mr. Turk:

Q. That all happened prior to the trial of the case in New York, did it not?

A. Yes.

Q. And you knew all that when you testified before Judge Bondy, did you not?

A. I knew it, yes. I was familiar with it.

Q. And yet in response to the question by Mr. Catanella that I read a little while ago from your testimony in New York you testified that Mr. Miller wanted the entire amount and would not entertain any discussion either with Mr.

Catanella, the Government, or anybody until he got the full amount. Did you not so testify?

A. No; that was the general conversation in the hall.

Q. Did you not so testify?

A. If it is in the record.

Q. If I told you that it was in the record would you say that you so testified?

A. If it is in the record I did, but not before Judge Goddard.

The Court: I don't see that it makes any difference.

Mr. Turk: He testified a few moments ago about this conversation before Judge Goddard, and yet in his testimony before Judge Bondy which came later he said nothing about it.

[fol. 53] The Court: He probably was not asked about it.

Mr. Turk: But he was asked about it. I want to read his testimony about it.

The Court: I don't want you to go into all this collateral issue. I won't let you question this witness any further on that. I don't see any difference between his statement now and his statement then as far as I can get it from your question.

The Witness: There was absolutely no such conversation before Judge Goddard.

Q. Who was present at that conversation before Judge Goddard?

A. May I ask what conversation you are referring to?

Q. The conversation you testified to just a few moments ago in response to Mr. Henry's question. You testified about some conversation that took place before Judge Goddard. I understood it to be—was it in his Chambers?

A. On those two certified checks?

Q. Yes.

A. Who was present?

Q. Yes.

A. The United States Attorney, the Assistant United States Attorney Mr. Catanella, this attorney, Mr. Blank, attorney Blank, and the defendant, Mr. Miller, Mr. Mackay, and myself.

Mr. Turk: May I ask your Honor to strike from the record all testimony with respect to the conversation with

Judge Goddard, on the ground that that is a statement made to the Court, and may I add that Judge Bondy struck that testimony from the record.

[fol. 54] The Court: Very well. It will be stricken out. You are to disregard the statement that was made in the presence of Judge Goddard in reference to the settlement of the case by payment of the amount that he owed.

Mr. Turk: That is all.

GEORGE S. COURTER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Henry:

Q. What is your occupation?

A. Internal Revenue Deputy Clerk in Newark.

Q. You are in the Newark Office?

A. Yes.

Q. How long have you been there?

A. Since 1919.

Q. I show you Government Exhibit 2 and ask you if you have seen that before? (Hands paper to witness.) Have you?

A. I could not say that I did.

Q. Do you recognize Mr. Prussian as having seen him before?

A. I do.

Q. When was the first time you saw him in reference to the Mackay Estate?

A. On April 6th, 1926.

Q. And did you have a conversation with him at that time?

A. Only that he came in and inquired if we had a check for the Mackay Estate?

Q. What did you do?

A. I looked up the matter and told him yes. He wanted to know if he could get the check. He said he had a power [fol. 55] of attorney. He said his power attorney was filed. I said we had no record and before we could release the check it would be necessary to have a power of attorney

on file. I took him to Mr. Wilson who was at the head of the Income Tax unit, and then Mr. Prussian left.

Q. Did you see him again that afternoon?

A. That afternoon he came back, and as I was coming into the office he was going out.

Q. Did you see him again after that?

A. No.

Mr. Henry: That is all.

Cross-examination.

By Mr. Turk:

Q. Have you any special form of power of attorney in your office?

A. No.

Q. And there is a statement required by your office before a check is paid that there is no other outstanding liability from the person receiving the check, and that must be filed in your office before payment is made. Is that not so?

A. It must be retained up to a certain amount, that is the procedure.

Q. That statement referred only to outstanding tax liabilities due the Government?

A. Yes.

Mr. Turk: That is all.

Mr. Henry: That is all.

[fol. 56] William E. Wilson, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Henry:

Q. What is your occupation?

A. Chief of the Income Tax Unit of the Fifth District of New Jersey.

Q. Your office is in Newark?

A. Yes.

Q. How long have you held such position?

A. I have held that position since 1924.

Q. Do you remember seeing the defendant Aaron Prussian in April, 1926?

A. I do.

Q. Do you remember about what date it was? Was it the early part of April or the latter part of April?

A. The first part of April.

Q. Did you have any conversation with Mr. Prussian?

A. Mr. Courter brought him into my office, and said that he was over for a check for the Mackay Estate, and Mr. Courter did not want to give it up unless he was sure that Mr. Prussian had some authority to receive it, so I also told Mr. Prussian that he would have to produce a power of attorney before he could release the check.

Q. And did he leave the office immediately after you told him that?

A. He did, yes.

Q. Did you see him again?

A. He came back again right after that, it must have been after one o'clock.

Q. Did he have any conversation with you at that time? What did he say to you and what did you say to him?

A. I do not think so. I think he then brought the power of attorney and I took him outside and we released the check.

[fol. 57] Q. Did he say "This is the power of attorney?"

A. I don't remember what was said. I know he gave us the power of attorney and we released the check.

Q. I show you this paper, Government Exhibit No. 3, and ask you whether this is the power of attorney that you referred to? (Hands paper to witness). Is that the power of attorney you refer to?

A. That is the one, yes.

Q. And after you received that did you deliver the check to Mr. Prussian?

A. I delivered the check to Mr. Prussian.

Q. Referring to Government Exhibit No. 2, is this the check?

A. I believe it is, yes.

Mr. Henry: That is all.

Cross-examination.

By Mr. Turk:

Q. As a matter of fact, you never saw this check before, did you?

A. That check?

Q. Yes, this check?

A. Is that the same one he showed me?

Q. That is the very check you just looked at.

A. Yes, sir, I did. Yes.

Q. Does your Department, the Internal Revenue, issue those checks?

A. No.

Q. Does your Department, the Internal Revenue Department, have charge of handling those checks?

A. Handing them out, yes.

Q. Will you say that a young lady in your department in your office did not hand that check out?

A. In my presence, yes.

Q. How many checks do you handle in a day?

A. It depends, some days there are only a few, and another day dozens come in.

[fol. 58] Q. Do you remember the date that the check was handed out?

A. April 6th.

Q. You remember particularly that it was on April 6th, 1926, three years and four months ago?

A. Yes.

Q. Did anybody talk to you about this case?

A. In which way do you mean?

Q. Did anybody talk to you about your testimony in this case?

A. No; only asked questions if I had a power of attorney, what information we had on it. That is all.

Q. And you recall definitely now in spite of all the work you do in your office that on April 6th, 1926, Mr. Prussian came in and you gave him that check and you saw that power of attorney was shown to you a few minutes ago? Do you recall that very definitely?

A. I do.

Q. How many of these cases have you a day?

A. Which are brought to my special attention?

Q. Yes.

A. Not very many.

Q. How many a day?

A. Well, maybe one a day, and maybe three or four.

Q. Do you remember the wording of all the papers that you look at?

A. No.

Q. Do you remember the wording of the paper that Mr. Henry showed you?

(No answer.)

Q. Do you?

A. Part of it, yes.

Q. This was just an ordinary case in the ordinary course of business in your office, was it not?

A. No. I would not say it was. No.

Q. How many claims for refunds were filed with the Col-

A. A great many.

Q. And this claim arose out of a claim for refund?

A. Yes.

[fol. 59] Q. You have a great many claims looked up in your office, have you not?

A. Not looked up, no.

Q. Your office had nothing to do with fixing the amount of the refund, did it?

A. Not the amount.

Q. That was done by the Washington office, was it not?

A. Yes.

Q. And this check from the Washington office was sent to your office simply for delivery to the proper person?

A. Yes.

Q. How many checks a day does your office receive from the Collector of Internal Revenue for all purposes on an average?

A. I can't give you the exact number. Maybe three or four hundred in a day or maybe only one hundred.

Mr. Turk: That is all.

Mr. Henry: That is all.

JUDAH L. BUCKMAN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Henry:

Q. Do you know Mr. Prussian, the defendant?
A. Yes.
Q. How long have you known him? About how long?
A. About six or seven years.
Q. I show you this Government Exhibit No. 2, this check, and ask you did you get that check, did you cash that check for Mr. Prussian. (Hands paper to witness.) Is that your endorsement on the back?
A. Yes.
[fol. 60] Q. And where did you cash it for him?
A. I cashed it at Sea Gate in my house.
Q. Sea Gate. Where is that? Down in Coney Island?
A. Coney Island.
Q. What was the conversation at the time? What did you say and what did Mr. Prussian say?
A. Mr. Prussian owed me two instalments on a second mortgage, and he did not pay me, and he said that he expected some check, and when he will receive the check he will pay me the instalment, and will give me something on account of the mortgage. Mr. Prussian owed me two instalments on a second mortgage, and when I asked him for it, when my bookkeeper asked him for it he said he expected some checks from Washington and as soon as he gets the check he is going to pay off the two instalments, and will also give me something on account, a couple of thousand dollars on the mortgage, and when he came in that money he asked me if I could give him change for this check. I told him I have not got so much money now. He sent me a check for $9,000 and wanted I should give him change. I told him I have not go so much money. He told me he is going to pay the two instalments, and give me $2,000 or $2,500—I don't remember exactly.

The Court: You will have to speak louder. This is important to these people that you speak out. Stand up and speak louder.

Q. Just tell his Honor and the jury all Mr. Prussian and you talked about.

A. Mr. Prussian came into my house and he said he re-[fol. 61] ceived the check, he has the check, and if I could give him change for this check. I told him I have not got so much. He told me he is going to pay the instalments that is due me, and also he is going to give me $2,000 or $2500, I don't remember exactly how much he gave me on that. I told him that after I deducted that I will not be able to give him the balance immediately, that I could give him two checks, one check he could cash right away, and the balance he could cash it in a couple of days after. He said he wanted to endorse the check. There was no ink in my house, and my bookkeeper was not there. He went to his house and took a fountain pen and endorsed the check. That endorsement of the check I saw he endorsed it as Aaron Prussian attorney, and I said I wanted an individual endorsement, and he endorsed it as an individual endorser also, and then I went to the bank to see if the bank will give me a credit on that check, and the bank accepted the check, and said it was O.K., and then I gave him a receipt for the amount that I received on the mortgage, and I gave the check, the balance, whatever I owed, the balance of the check. That is what happened.

Juror No. 5: How much money did Mr. Prussian get at that time from you?

The Witness: He got about around $6,000, from five to $6,000.

Q. That was his change after he paid off the amount on the mortgage?

A. Yes.

Mr. Henry: That is all.

[fol. 62] Cross-examination.

By Mr. Turk:

Q. Are you sure of that amount?

A. I am not sure exactly. I recollect that I gave him two checks change.

Q. Do you recall the amount if those checks?

A. I can't remember it now. I got it in my books.

Q. As a matter of fact he told you $1,500 in anticipation of some mortgage?

A. He owed me about $1200 or $1400, on instalments, and gave me also on account of the $2,000 or $2500. I don't remember.

Q. You say now that the amount was not $1500 he owed you under that mortgage?

A. Not what he owed me. He owed me about $5,000.

Q. Will you say now the amount was not $1500?

A. On what was due?

Q. Yes.

A. About what was due was $1500.

Q. And you gave Prussian two checks totalling the difference?

A. He gave me an account of the purchase money mortgage $2,000 or $2500. I could get that by telephone from my office, all the figures.

Q. Will you say now that you got more than $1500 plus an additional payment of $600 from Aaron Prussian at that time?

A. Yes. Sure I got more.

Q. More than $2100 at that time?

A. Yes; at that time.

Mr. Turk: May I ask that your Honor give this witness an opportunity to telephone his office and find out the amount.

The Court: Find out exactly what Mr. Prussian paid you, and what you paid him back out of the check.

[fol. 63] Mr. Henry: Mr. Turk concedes that Mr. Mackay is the administrator to the will annexed of the estate of Jennie E. Mackay, and was ever since Mrs. Mackay's demise. The defendant also concedes that Malcolm S. Mackay did not endorse his name on Government Exhibit 2, which is the refund check.

Mr. Turk: We will concede that if Mr. Mackay were here his testimony would be the same as it appears on the record at the first trial. We will take all of Mr. Mackay's testimony.

The Court: I don't know that the Government wants to offer all of it.

Mr. Henry: I don't see how we can.

Mr. Turk: I told Mr. Henry originally that I would stipulate as to Mr. Mackay's testimony only. That was Mr. Henry's suggestion.

Mr. Henry: No. I wanted him to concede that Mr. Mackay was the administrator and that he had been and also that he did not sign this particular check. Mr. Turk said that he would not have the privilege of cross-examining, and I said "What do you want". If he wants his testimony in evidence I have no objection to what he testified to in the former trial.

The Court: I think you can offer his testimony if you want to.

He has a right to be confronted with the witness. At the same time he can make any admission that he wants to.

Mr. Turk: My understanding of the Government's re-
[fol. 64] quest at the time was that I would stipulate Mackay's testimony. I said I would be willing to stipulate Mackay's testimony, but simply to take one or two items out is not what I intended when I said I would stipulate.

Mr. Henry: All I said was that we could not get Mackay because he was out in Montana on a hunting trip. If you do not want to try the case now I will adojurn it so that you can get the information which you wish, or you can stipulate that Mackay is the administrator to the will annexed of Jennie E. Mackay, and that he did not find his name on the back of this check. If not we will adjourn the case.

Mr. Turk: I do stipulate to that, because this is part of his testimony.

The Court: My understanding is that the Government cannot stipulate to what a man may testify in a criminal case.

You concede that Mackay was the administrator and that he did not sign his name?

Mr. Turk: That was my understanding at the time I agreed to stipulate.

Mr. Henry: You can offer it if you like. You represent the defendant.

Mr. Turk: I can't make any concession for the purpose of the record unless Mackay's entire testimony is taken.

Mr. Henry: You can offer it. I can't offer it. I am stopped by the Court from doing that.

Mr. Turk: Is this proposition different from stipulating as to the testimony of a Government chemist?

[fol. 65] The Court: Yes. You don't stipulate what the Government chemist will testify, but you stipulate that those are the facts.

Mr. Turk: In addition to that stipulation I understand the District Attorney will stipulate that Mackay authorized the attorney Miller to retain Mr. Prussian.

Mr. Henry: That is what he said, that he authorized Mr. Miller to go ahead and retain Prussian. He authorized Miller to retain Prussian and Kay & Kay or anybody that he wanted.

Mr. Turk: If the District Attorney will stipulate as a fact that Mackay authorized Miller to retain Prussian in both estates I will put any concession on the record that the District Attorney wants to help prove his case, but unless he does that I can't concede anything.

The Court: You do not deny that he did authorize Miller and that Miller did employ him, that Mr. Mackay authorized Mr. Miller to employ Prussian to represent him, and that Mr. Miller employed Prussian?

Mr. Henry: Mr. Miller testified that he employed Kay & Kay and Prussian. I can't admit something that I don't believe to be true.

Mr. Turk: The point I am getting at is this. On page 3 and on page 18, my recollection of the testimony is that Mackay testified that he authorized Mr. Miller to retain Mr. Prussian in both estates. I don't want to quibble about Kay & Kay or anyone else. He says he authorized Miller to retain Prussian in both estates.

[fol. 66] Mr. Henry: That is all right.

The Court: He says though that he employed Kay.

Mr. Turk: I want a stipulation that Mr. Mackay authorized Mr. Miller to retain Aaron Prussian.

Mr. Henry: That is all.

The Court: It is conceded here that Mr. Mackay authorized Mr. Miller to employ Mr. Prussian to present this matter to the Government. Gentlemen, you will be permitted to separate during the noon recess. During that time you are not supposed to discuss this case with one another, nor are you permitted to allow anyone to discuss it with you. We will now take an adjournment until 2 P. M.

(Whereupon an adjournment was taken until 2 P. M., at which time the trial was resumed.)

JUDAH L. BUCKMAN, recalled, having been previously sworn, testified as follows:

Cross-examination.

By Mr. Turk:

Q. I understand that you cannot get the amount?
A. No, I can't get the record.

By Mr. Henry:

Q. The approximate amounts that you testified to this morning were what? How much cash did you give him and how much credit did you give him?
[fol. 67] A. I did not give him cash. I gave him checks.
Q. What was the approximate amount?
A. The approximate amount that he paid me was about $2,000.
Q. And you gave him the difference?
A. I gave him the difference in checks.

Mr. Henry: That is all.
Mr. Turk: That is all. You say that Mr. Prussian signed the endorsement on the check?
The Witness: Yes.
Mr. Henry: That is all. The Government rests.
Mr. Turk: May I ask your Honor to excuse the jury. I have a rather lengthy motion to make.
The Court: All right. The jury will be excused.

MOTIONS TO DISMISS

Mr. Turk: May it please your Honor, the defendant moves to dismiss the case, the indictment, on the ground that it is defective, defective in several particulars. The indictment is brought in two counts, the first of which alleges that the genuine draft was for $9,044, and was drawn by an officer of the United States Treasury made payable to one Mackay. The indictment charges that the defendant herein obtained possession of the draft, falsely forged the endorsement of Mackay, and uttered the draft with the forged endorsement thereon upon this last witness Buck-

man. In count one of the indictment is alleged that the de- [fol. 68] fendant did falsely make, forge, and alter a certain obligation of the United States, to wit, the endorsement on the draft, that the draft for money was duly issued to the said Malcolm S. Mackay, and thereafter the defendant obtained possession of said draft, and did then and there falsely forge the endorsement on the said draft by falsely making and forging the name Malcolm S. Mackay on the back of said draft for money, that said draft for money with the said forged endorsement thereon did together constitute a forged obligation of the United States as the defendant then and there well knew, with intent then and there and thereby to defraud. The second count of the indictment alleges that the defendant did feloniously pass, utter, and publish to and upon one J. L. Buckman, a certain forged obligation of the United States, to wit, a draft for the payment of money. In other words, both counts of the indictment refer to this so-called forged endorsement of a forged obligation of the United States.

Now, the first point which the defendant raises with respect to that indictment is that the allegation is that an obligation of the United States has been forged by the defendant, when further allegations show that the endorsement, and not the check itself was forged. That I contend is a repugnant allegation that makes the indictment, absolutely false and absolutely defective within the meaning of Section 147. I have handed up to your Honor three cases [fol. 69] which bear on the point which I am about to raise. Section 147 (Compiled Statutes 10317) defines securities and obligations of the United States dealt with in subsequent sections including Sections 148 and 151 (Compiled Statutes 10318, 10321). Section 147 is in the following language: "The word obligation or other security of the United States shall be held to mean all bonds, certificates of indebtedness, national bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which may have or may be issued under any Act of Congress."

The Court: On what point are you raising this?

Mr. Turk: That the indictment is repugnant since it alleges that the defendant forged an obligation of the United States, and then refers to the endorsement. The endorsement is not an obligation of the United States.

The Court: The indictment is plain, is it not?

Mr. Turk: The indictment, the first count, is bad according to the De Lemos case. There the Court ruled that the indictment was absolutely defective. The two counts in this indictment are drawn following Sections 148 and 151. [fol. 70] Section 148 is in the following language: "Whoever with intent to defraud shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined not more than $5,000 or imprisoned not more than fifteen years." Section 151, which refers to the uttering of forged obligations, reads as follows: "Whoever, with intent to defraud, shall pass, utter, publish, or sell, or attempt to pass, utter, publish and sell, and shall bring into the United States or any place subject to the jurisdiction thereof, with intent to pass, publish, and sell, or shall keep in possession or conceal with like intent, any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 and imprisoned not more than 15 years." Your Honor will note that first we have Section 147 which defines what the words obligation or other security of the United States shall be held to mean, and then in Sections 148 and 151 we have the identical wording, falsely make, forge, counterfeit, or alter any obligation or other security of the United States, defined by Section 147; while Section 151 makes it a crime to pass, or utter, any obligation or security defined by Section 147.

The Court: But there are other sections.

Mr. Turk: Section 29. I will come to that later on. Section 147, which defines obligation or other security of the United States, after enumerating the particular obligation [fol. 71] and security which the quoted expression shall be held to mean does not say "or any assignment or endorsement thereof", nor does it use any equivalent expression. And we must not lose sight here of the fact that we are dealing with criminal statutes, and in those portions of their context which define the offenses they must be strictly construed. Your Honor will find that not only are the au-

thorities uniform on this question, and I will read to you the opinion of the Attorney General (22 Opinions of the Attorney General, page 40—1897—99). Section 5413 of the Revised Statutes was interpreted by him as follows: "Section 5413 of the Revised Statutes (now Section 147 of the Criminal Code) is classified under 'Title LXX—Crime', and is the first section of Chapter 5. It was first enacted as part of a separate law approved June 30, 1864 (13 Statutes, pp. 218-222) which act also contains substantially the penal provisions contained in Sections 5414, 5430, and 5431 of the Revised Statutes. The obvious intention of Congress was to group under one heading in one consolidated statute all the provisions relating to crimes against the operations of the Government contained in separate acts. It is a well-known principle of statutory construction that the transfer of a separate statute or part thereof from a particular act to a general provision does not ordinarily alter its significance. The fact that Section 5413 is separated by num-[fol. 72] ber from the succeeding related and cognate section does not necessarily extend its influence and effect over the whole volume of the Revised Statutes. The context manifestly evidences the intention of Congress to apply the provisions of that section to the construction of the sections that follow, and the history of Section 5413 and its associated origin with some of the succeeding sections under the ordinary rules of statutory construction makes this perfectly plain. In the absence of similar terms applying the provisions of Section 5413 to the whole Revised Statutes and to acts passed subsequently it can only be reasonably inferred that it was not intended that it should apply further than to the immediate context." As to Section 29, your Honor will find if you have the Gessell case there, that specifically held that this case involved the endorsement of a genuine draft, and there is no question about the fact that the draft in this case is a genuine Government draft. The only question arose with respect to the endorsement of this genuine draft. The Gessell case, and the cases that follow the Gessell case are all uniform on the proposition that cases involving forged endorsements, cannot be brought under sections 148 and 151 because the endorsement does not constitute a forged obligation of the United States; so that unless the indictment in its allegations satisfied the requirements of some other provision of the Criminal Code,

it must be held insufficient. The only other section under [fol. 73] which this indictment could possibly be brought is Section 29. Your Honor has the United States Code Annotated, and you will find that section on page 73. It provides as follows: "Whoever shall falsely make, alter, forge, or counterfeit any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving from the United States or any of their officers or agents, any sum of money, or whoever shall utter or publish as true any such false, fraudulent, altered or counterfeited deed, power of attorney, order, certificate, receipts, contract, or other writing with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, or whoever shall transmit to, or present at, knowing the same to be false, altered, forged, or counterfeited, or whoever shall transmit to, or present at, any office or officer of the United States, any deed, power of attorney, order, certificate, receipt, contract, or other writing in support of or in relation to any action or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall be fined not more than $1,000 and imprisoned not more than ten years."

Your Honor will note that in Section 29 one of the vital ingredients to make an indictment good under that section, 29, if it can be brought under that section, is the allegation "with intent to defraud the United States", and the cases [fol. 74] are specific that unless that allegation is contained in the indictment, "with intent to defraud the United States", the indictment is absolutely defective. In this indictment the first count lacks that intent. I call your Honor's attention to page 1. I also call your attention to the fourth or fifth line from the bottom of that page which reads as follows, "with intent then and thereby to defraud in violation of Title XVII, United States Code, Section (and so forth) against the peace and dignity of the United States and contrary to the form of the statute made and provided." There is no allegation of intent to defraud the United States which the cases hold is essential under Section 29. In the second count the intent is alleged "and with intent to utter the same as true and genuine, and with intent then and thereby to defraud against the peace and dignity of the United States, and contrary to the form of the

statute (and so on)." I said a moment ago that the allegation of an intent to defraud the United States was essential before the indictment could be brought under that section. Now, I have in the Lewis case here this opinion by the Court: "Measuring this indictment by the yardstick of this section we find that each count falls far short in very important essentials. The purpose and intent are made essential ingredients of the crime, and the intent to defraud is not stated generally and comprehensively as in some sec- [fol. 75] tions, notably Sections 148 and 151, but is restricted to a specific party, to wit, the United States. In cases like that on file, the Courts have specifically held that the criminal act of forging or uttering a forged endorsement must be done with the intent to defraud the United States, and that the failure to so state in the indictment was a fatal defect." There are some cases which hold, a long line of cases, the forgery of an endorsement on a genuine draft cannot be brought under Section 29, because the words "or other writing" referred to in Section 29 do not refer to the endorsement on a Government obligation but rather refers to a series of papers such as is referred to in Section 29. If your Honor has the De Lemos case, the point which the defendant makes is that an indictment which reads that the draft constitutes the obligation which was forged, when further averments show that the forgery consisted in the false making of the endorsement is repugnant and does not properly lay the offense. In the second count of this indictment, and I think your Honor will see at a moment what I am referring to, it says that the defendant did unlawfully, wilfully, and knowingly utter and publish to and upon J. L. Buckman a certain forged obligation of the United States, to wit, a draft for the payment of money, which was issued by an authorized officer of the United States. The second allegation in the same count says: "He, [fol. 76] the said defendant, Aaron Prussian, did then and there well know the said endorsement thereon to be false and forged." The indictment is almost identical with the indictment drawn in the De Lemos case, because there it referred in the first part of the indictment to a forged obligation, to wit, a draft, when the second averment was that it was the endorsement, and not the check, which was forged, and there the Court held that the indictment was defective. There is no question as to the repugnancy of

this allegation which makes that count absolutely bad. I have here a portion of the case. My point is that where the indictment says that we forged the check, and then later on says we forged the endorsement that is repugnant.

The Court: Don't you think that where the instrument is forged in any way that that constitutes forgery, and where it sets forth the nature of a forgery that would be sufficient?

Mr. Turk: That would be true if the allegations in the indictment were not repugnant.

The Court: Is it repugnant if you use the word forgery in a general sense?

Mr. Turk: Yes, because we are charged with forging an obligation or other security of the United States. We are charged with forging a Government check.

The Court: Before you can be charged with forgery do you think that it is necessary to forge the instrument itself by writing the Government's name on it?

[fol. 77] Mr. Turk: No, but I say that they charged us with forging that check, and then they say in the next paragraph of that indictment that we forged the endorsement. I say those two allegations in that indictment are repugnant, and make the indictment bad, and my statement is supported by the weight of authority. The Gessell case and the De Lemos, say that the indictment is absolutely bad. Here is the opinion in the De Lemos case which has been upheld in the Gessell case. The Court says here "But we find in count 1 and in counts 2 and 3 as well, a clear averment that the draft itself without the endorsement is forged. This, of course, is untrue, and is plainly repugnant to the further averment in the count that the forgery consists in the false making of the endorsement." That is identical with this case. "It is plain that counts 1 and 2 cannot be held good under Section 5421 (Compiled Statutes, Section 10193) which would have required the laying of the charge on the endorsement and not on the draft, and should have otherwise conformed to the requirements of that statute. We are of opinion that the demurrer should have been sustained, and the indictment quashed." That opinion of the Court in the De Lemos case was referred to in the Gessell case, and the Court in the Gessell case in referring to the De Lemos case, says this: "It will be ob-

served that the Court clearly held that the counts were [fol. 78] fatally defective because it was alleged that the draft itself was forged, and that a subsequent allegation that the forgery consisted in the false making of the endorsement was repugnant. The essence of the decision is that there was a clear distinction between alleging a draft to be forged and alleging an endorsement of a genuine draft to be forged. We think this distinction sound and conformable to the fundamental principles of criminal pleading." In this indictment you have the plain allegation that the defendant forged an obligation of the United States. It says that the check itself was forged when the subsequent allegation says that he did not forge the check at all but the endorsement on the check. In Section 147 you will find what obligation or security of the United States shall be held to mean, and the cases hold that the forging of an endorsement cannot be brought under the section. If your Honor will just glance over that second count of the indictment you will see that it is identical with the indictment in the De Lemos case. There is no difference in them.

The Court: Did this case go to the Circuit Court of Appeals before?

Mr. Turk: No. This case was brought in the Southern District and was dismissed by Judge Bondy for lack of jurisdiction. These questions were not presented before Judge Bondy.

The Court: Is that all you want to say?

Mr. Turk: Then there are cases I want to present: I [fol. 79] stopped for the moment because I am of the opinion that it will not be necessary to go any further.

Mr. Henry: Suppose we settle those two points and then you can present the next one.

May it please the Court, counsel for the defendant has brought up the point that under these two sections set forth in the indictment such a crime as is charged here with this statement of facts, namely, the endorsement on a draft, an obligation of the United States, no prosecution lies. May I call the Court's attention to Hamil vs. The United States, 298 Federal, 369 (Circuit Court of Appeals, Fifth District), from which I quote the opinion of the Court: "Section 147 of the Criminal Code (Compiled Statutes

10317) includes a check such as is described in the indictment within the definition of an obligation or other security of the United States. We are of opinion that Section 148 punishes the forgery of an endorsement of such an obligation or security. The obligation to pay a genuine debt does not become complete until it is properly endorsed. A forgery of the endorser's name is as effective a method of defrauding as the forgery of the name of the drawer of the check. The demurrer to the indictment therefore was properly overruled." Therefore under that authority the prosecution for the forgery of an endorsement on a check does lie under that section. In other words, I may have a good obligation of the United States such as this [fol. 80] was when it was handed to Mr. Prussian as we allege, and when Mr. Prussian signed somebody else's name on the back of it without authority, as we allege, the instrument thereupon becomes forged, and the whole thing becomes forged. Our indictment sets forth in the very beginning, the first count, that the defendant did then and there unlawfully, wilfully, knowingly and feloniously make, forge, and alter a certain obligation of the United States, to wit, the endorsement on a draft for the payment of money. It does not say two different endorsements. It says one. It says he forged an obligation of the United States. What was it? It was the endorsement. It means exactly what it says, that he forged the endorsement. That is very plain language, and it seems to come within the case of Hamil vs. United States. The second point raised here is that they say this case comes within the meaning of the De Lemos case. May I call the Court's attention to the following, that the indictment at hand is different from the indictment in the De Lemos case because in that indictment it says: "did unlawfully, feloniously, and falsely make and forge a certain obligation of the United States, to wit., a draft for money," and then later on it says that he forged the endorsement. There is a clear discrepancy in the indictment. In one part it says that he forged the draft, and in the second part it says that he forged the endorsement. But in this case we say the [fol. 81] endorsement, so we distinguish the case on hand and the indictment on hand from the De Lemos case. In fact the indictment in this case was drawn with the De

Lemos case in mind, and we do not say he forged the draft, but we say that he forged the endorsement, so we contend that this case does not come within the meaning of the De Lemos case on that point at all. In that particular case, the De Lemos case, the Court held that the indictment was defective because of the fact that in the beginning of the indictment the pleader charged that the draft itself was forged. We do not charge any such thing in this indictment. We say he forged the endorsement. We do not say he forged the draft. Also in the De Lemos case they alleged in the three counts that the draft itself was forged. Of course, that would be bad. But we say the endorsement in both places. May I call the Court's attention to the fact also that this very Court itself has already ruled on all these points which are now being brought up in this very case, and Judge Burrows, who was sitting here a couple of months ago, I think it was the May Term, overruled this motion to dismiss the indictment. A motion was made to dismiss the indictment on this very ground, that it did not come within the Statute and that it did not contain sufficient facts to warrant a prosecution, and I cited all these very cases which are being presented now, and the Court overruled the demurrer. I don't know whether it was without prejudice or not, but I suppose it was.

[fol. 82] Mr. Turk: If your Honor will take the second count of the indictment first I think we can settle this matter. Mr. Henry is in error.

The Court: Take the first count first.

Mr. Turk: The De Lemos case does not apply only to the first count of this indictment, but also to the second count.

The Court: The second count simply charges that he uttered a false instrument.

Mr. Turk: It is worded differently. If you will read the second count of the indictment it says that the defendant did then and there unlawfully, wilfully, knowingly, and feloniously pass, utter, and publish to and upon one J. L. Buckman a certain forged obligation of the United States, to wit., a draft for the payment of money, which was drawn by an authorized officer of the United States. If that does not charge that the defendant passed a forged check drawn

by an authorized officer of the United States then I can't read plain English.

The Court: Would it not be a forged instrument if he knew it was a false endorsement?

Mr. Turk: The indictment says that he forged the draft, and he knew the endorsement to be forged.

The Court: Suppose we take the facts that he passed an instrument which he knew had a forged endorsement on it, would not that constitute the uttering of a forged obligation?

[fol. 83] Mr. Turk: It would not constitute the uttering of a forged obligation of the United States. The point that I want to raise is that this indictment says that there was a forged draft, and the second allegation says that the endorsement was forged and not the draft. The indictment is plain: it says a forged obligation of the United States, to wit, a draft for the payment of money. Then it says that it was not the forged draft, but it was the forged endorsement. Which of those two things in the indictment is correct? One of those two allegations is wrong. Which is it?

The Court: I will overrule your motion.

Mr. Turk: I respectfully except. I move to dismiss further on the ground that it affirmatively appears by the check which the Government has offered in evidence that no forgery has been committed. I respectfully direct your Honor's attention to the endorsement on this check. It is the contention of the defendant that under neither of the criteria which the Courts have laid down for the purpose of determining forgery does that endorsement on that check constitute forgery. The two criteria which the Court have laid down for the purpose of determining a forgery are as follows: 1. Does the writing charged appear upon its face to be the genuine writing of a person other than the defendant? 2. Would the writing constitute evidence against the party by whom it purports to have been made? As regards the first point it appears to be the act of the per-

[fol. 84] son who is charged with committing a forgery. In other words, would that endorsement be evidence against Mackay in the form in which it is made. I may say to your Honor that when these points were called to the attention of Judge Burrows, the Judge then indicated by his attitude on the bench—as a matter of fact as I recall he had quite a

lengthy discussion with Mr. Henry about this point, and the Judge indicated that the endorsement did not constitute a forgery. Mr. Henry asserted that it did.

The Court: For what reason?

Mr. Turk: Because it appears to be the act of the defendant. It says "Malcolm S. Mackay, Aaron Prussian, Attorney, Aaron Prussian."

The Court: I would not know if I looked at this whether the defendant intended to forge the name of Mackay and then sign his own name. The two signatures are identical. The word Mackay does not seem to be the writing of the defendant.

Mr. Turk: The only thing you can charge this defendant with in this case is that he falsely assumed to be the attorney for Mackay when he was not. In other words, that it was a false assumption of authority. If your Honor will just reserve decision on that for a moment——

The Court: Yes; I want to hear him.

Mr. Turk: The testimony in this case leaves no room for argument, and we have admitted that the defendant signed [fol. 85] the name of Malcolm S. Mackay on that check, and his own name thereafter as attorney, and then his own name in person. I will draw your Honor's attention to the case of Bailey against the United States.

The Court: I have that here.

Mr. Turk: In that case a writ of error was brought to review a judgment of conviction under Section 29. Your Honor will note in that case that the indictment was brought under Section 29 and not under Sections 148 and 151. In this case a check or draft payable by the United States through its treasurer to the order of one Hochrey as administrator came into the possession of Bailey as attorney for the estate. Bailey endorsed the check or draft in the name of the administrator, adding his own name to the endorsement. He then deposited the check or draft to his own account in the bank, pursuant to which endorsement the amount of the draft was paid by the United States to the bank. This occurred early in the year 1922 and Bailey did not account to the administrator for the moneys thus collected and received until some time early in the year 1925, when he was called upon by a special agent of the Government. The facts are almost identical. Bailey

admitted that the endorsement was his and later an indictment containing two counts was returned against him. One of the assignments of error was based on the insufficiency of the testimony to support the judgment and verdict, [fol. 86] with respect to which the Court held: "No testimony was offered at the trial tending to show an express authorization to make the endorsement in question. Nor was there any testimony tending in any way to limit or restrict the implied authority arising from the contract of employment and the relationship of the parties. If the plaintiff in error had implied authority to endorse the check or draft arising out of his employment there was no forgery of the endorsement, no uttering or publishing of the forged endorsement, and no offense against the laws of the United States. We think the latter view is the correct one. The plaintiff in error was employed as an attorney to collect certain claims against the Government; he had undoubted authority to receive payment in cash or money, and having received instead a check payable to his clients, under the great weight of authority he had implied authority to endorse and cash the check. Thus, in re Brashear (D. C.) 275 Federal, 481, a dividend check was issued on the depository by a trustee in bankruptcy, countersigned by the referee, and made payable to the creditor, and it was held that an endorsement of the check by the attorney for the creditor in the name of the creditor constituted an acquittance by the creditor to the trustee in bankruptcy and to the depository. In Brown v. Grimes, 74 Ind. App., 655, 129 N. E., 483, the Court said: "It is a well established rule of law that an attorney who has a claim for collection has no [fol. 87] right in the absence of special authority to accept in settlement anything but money. This rule is made the law in this State by statutory enactment. Under this rule appellant's said attorney had no authority to receive the check as payment, nor could he by his endorsement impose a new contract liability upon appellant, who was his client; but, having taken the check in due course of his employment he had implied authority to make a formal endorsement in behalf of his client for the purpose of making the collection and receiving the money. Having by endorsement of the check received the money thereon, Underwood had by this means effected the purpose for which he had

been employed. He had collected, and had in his possession for appellant, the full amount of the judgment he had been employed to collect. We therefore hold that the acceptance and endorsement of the check by appellant's attorney, and the receipt by said attorney of the proceeds of such check, under the peculiar facts of this case, amounted to a payment of the judgment. The conclusion we have reached is in accordance with the great weight of authority"—citing many cases. Your Honor will note in that Bailey case, and I don't believe the facts of the Bailey case are any different from the facts here, that there Bailey appeared for the administrator of an estate that was entitled to some money from the Government. He got a check payable to the ad- [fol. 88] ministrator and he signed the administrator's name, signed his own name as attorney, and deposited the check in the bank, and there the Court held that such endorsement by the great weight of authority does not constitute forgery. The only reason I believe why Judge Burrows failed to dismiss the indictment upon that ground was because he preferred to have the matter threshed out upon the trial of the case. His attitude at the time was that he would dismiss the indictment upon that ground, and that was the ground that he considered first on that motion. Now, the defendant comes into court and says "Yes, I signed the name of Malcolm S. Mackay, and I signed my own name as attorney." That act appears to be the act of no person other than the defendant himself. There does not seem to be any question about that. That endorsement, the endorsement of Mackay, and the second endorsement of Prussian, show that it was his own act, and the Court has held, by the great weight of authority, that where it appears to be the act of the person himself it does not constitute forgery, and I say that the endorsement is conclusive of the fact that no forgery was committed. If this defendant is to be charged with anything he should be charged with the false assumption of authority when he has no such authority.

Mr. Henry: If what counsel says were true anybody could come along and forge the payee's name on the back of [fol. 89] a check and put some fictitious name under it, as attorney, and you could not prosecute him.

The Court: This Bailey case holds that an attorney has authority.

Mr. Henry: I am coming to that. I am taking up my opponent's first point. That was his point. He says because it appeared on the back of the check no crime was committed. If that is true anybody could get away with forgery and could not be prosecuted.

The Court: I don't think that there is anything to that.

Mr. Henry: On the second point that an attorney has ample authority to sign or endorse his client's name as payee on the reverse side of a draft or check I will refer your Honor to Corpus Juris, Volume I, Section 172, under the title "Attorney and Client". The author says in part "An attorney has no authority to endorse his client's name on negotiable paper unless his endorsement is a mere matter of form to enable him to effect the purpose for which he was employed by his client." We have no such facts here. I refer your Honor to Chatham vs. Hochstadter, 11 Daly, 343, in which Judge Daly held that where an attorney at law employed to collect a claim who received in payment thereof a check payable to his client's order, and who endorsed his client's name thereon by himself as attorney and deposited it to his own credit in his bank and drew the funds thereon, that such an endorse-[fol. 90] ment was without authority and fraudulent. "An attorney at law employed to collect a claim who receives in payment thereof a check payable to the order of his client has no authority to endorse it in his clients' name and cash it. The power to endorse checks and bills must be expressly given."

Filly vs. Gelman, 34 Supreme Court, 339. A case which is strikingly like the case at bar is Brown vs. People's National Bank, 170 Mich., 416. In that case it appears that one Robert Campbell, an attorney of Jackson, Michigan, by virtue of a retainer which his law firm had with the plaintiff Catherine Brown, received from the administrator of her father's estate a draft to her order. The draft was in the following words: "Washington, D. C., May 27, 1907. $608. Pay to the order of Catherine Schilling $608.37. Frederick Echelberger, Trust Officer. Thomas Parker, President of the Columbia National Bank, Washington, D. C."

Campbell endorsed the name of the payee, Catherine Brown, on the back, and put his own name Robert Camp-

bell underneath it, and cashed the check and appropriated the proceeds thereof.

In a suit brought by Catherine Brown (nee Schilling) against the bank it was held "That the endorsement of plaintiff's name on the draft was a careful imitation of her genuine signature and was a forgery", and it was further held that the bank which cashed the check upon such [fol. 91] forged endorsement would ordinarily have been liable but that on account of the plaintiff's laches in giving notice of the fraud to the bank after she discovered it an equitable estoppel arose. Now, it is a dangerous thing, I submit, to allow anyone to come along who may have authority to get possession of a check, and to allow him to endorse the payee's name on the reverse side of the check when he has no authority to do that very thing which he is charged with doing, and in this case I suppose this motion to dismiss is addressed to the evidence as well as to the indictment.

The Court: It is addressed to the evidence.

Mr. Henry: The evidence clearly shows that this man was particularly forbidden to cash the check or to endorse it, and yet in the face of that Prussian said he went and did it. How can it be said that he had ample authority to endorse his client's name on the back when he had positive authority that he can't do it and therefore we do not come within the meaning of this case which my opponent has cited to the Court.

Mr. Turk: I should like to answer my friend Mr. Henry. I call your Honor's attention to the two powers of attorney. The testimony of Mr. Miller was that the second power of attorney was not intended to limit the first. Your Honor will recall that I was very careful about that testimony. You will recall that I was careful in my question-[fol. 92] ing of Mr. Miller to bring out the fact that it was not intended to limit the powers conferred in the first power of attorney because Mr. Miller admitted that in the trial of the first case, and I wanted to make sure that he admitted it in this case. This first power of attorney gave him the right to do anything that Mackay would have done.

The Court: In this Bailey case it gives ample authority to an attorney to sign his client's name. How would you limit that authority if that is the general rule?

Mr. Turk: The power of attorney can be limited.

The Court: You have a written instrument which takes away from him the authority to endorse the check.

Mr. Turk: Standing alone, your Honor is right. But you have to take that second power of attorney in conjunction with the testimony of Mr. Miller that it was not intended for that instrument to limit the first power of attorney.

The Court: Then it would be a question of fact for the jury to pass on. In other words, if the jury should conclude that he did have authority, as I will instruct them, to sign his client's name, then it would not constitute forgery, but if he did not have authority either implied or express, then it would constitute forgery.

Mr. Turk: I can give your Honor a long line of cases.

The Court: A person would be absolutely at the mercy [fol. 93] of his lawyer if he could not restrict his authority to sign a check. It might subject the drawer of the check to additional liability because he would have to come in and familiarize himself with the authority given by the client to his attorney. Here there was an express power. On the back of this Government check it appears to me to limit the authority of anyone to sign the payee's name to it. I will overrule you. You demur to the evidence I take it?

Mr. Turk: Yes. I respectfully except. I move to dismiss on the ground that the evidence is insufficient to convict.

The Court: Denied.

Mr. Turk: I respectfully except.

Mr. Henry: There is no proof in this case that the defendant is an attorney at law.

The Court: You proceed with your case.

Mr. Turk: Does your Honor overrule my motion with respect to the second count of the indictment?

The Court: Yes, for this reason. I think the second count is sufficient in that it charges the defendant with uttering a forged instrument. That is the effect of the second charge. It is the uttering of a forged instrument, and it is not necessary to set out any such detail specifically as it would be in a case where a forgery is charged.

Mr. Turk: I think your Honor has overlooked this point. The second count of the indictment charges the defendant [fol. 94] with passing, uttering, and publishing to and upon one J. L. Buckman a certain forged obligation of the United States, to wit., a draft for the payment of money which was drawn by an authorized officer of the United States. In other words, they charge him with uttering a forged check drawn by an authorized officer of the United States.

The Court: My opinion is that the forgery there consisted in forging the endorsement.

Mr. Turk: They don't say so.

The Court: It would be a forged instrument if there was a forged endorsement.

Mr. Turk: They should say so, and there should not be a repugnant allegation. Mr. Henry said that the indictment in this case is different from the indictment in the De Lemos case, and I say it is identical. There is no difference between the two indictments, and in the De Lemos case it was held that the indictment was bad. There is no difference whatever between this second count and the indictment in the De Lemos case.

The Court: The demurrer will be overruled.

Mr. Turk: I respectfully except.

[fol. 95] Aaron Prussian, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Turk:

Q. What is your business?

A. Tax Counsellor.

Q. Are you admitted to practice in the Treasury Department of the United States?

A. Since 1921, yes, sir.

Q. Before what department are you authorized to practice?

A. The Internal Revenue Bureau, and the Board of Tax Appeals.

Q. Are you familiar with the requirements relating to admission to practice before the Internal Revenue Bureau and the Board of Tax Appeals? One need not be an attorney to practice before the Treasury Department, is that so?

A. No. One need only be familiar with the tax rules, and be familiar with general, and a graduate of a law school.

Q. Are you a graduate of any university?

A. Harvard.

Q. Did you take law?

A. Yes.

Q. There?

A. Yes.

Q. What year did you graduate?

A. 1912.

Q. Do you know Mr. Mackay?

A. I do.

Q. Mr. Malcolm Mackay?

A. Yes.

Q. Do you know Mr. Miller who testified this morning?

A. I do.

Q. Did you speak to Mr. Miller and Mr. Mackay with reference to retaining you to secure a refund of taxes paid by the Mackay Estates?

A. On several occasions, yes, sir.

Q. About when was the first time you spoke to either Mr. Miller or Mr. Mackay?

[fol. 96] A. Some time in the fall of 1924 I called with my former associate. I was at that time a member of the law firm of Kay & Kay in Washington. I called at the office of the attorney for the estate with regard to a certain refund that seemed to be coming to the estate from the records and file of the probate court where the estate was probated, and we heard nothing of the matter for about a month or two. Shall I continue and tell the story in my own words?

Q. Yes.

A. In November, 1925, I discontinued my association with Kay & Kay and entered upon practice in New York, as Kay & Kay had been former employees of the department in Washington, and were under charges by the——

Q. Never mind that.

A. In January, 1925, I called up Mr. Mackay and told him that unless the estate would pursue the refund claim prior to March 15th the Statute of Limitations would apply, and asked him whether he had authority. If I said Mr. Mackay I meant Mr. Miller. I said that unless he took the matter up with Mr. Mackay both myself and the estate would lose a profitable enterprise. He called me several times. About that time he was retiring from practice I believe, and he called me either from the office where he was retiring from or from the Union League Club where he lived, and finally told me to prepare the papers and he would submit them to Mr. Mackay. I mailed them to him in triplicate or quadruplicate, copies of the agreement retaining me in the matter of the refund due the Jennie Mackay Estate, and in the matter of the refund due Duncan Mackay Estate, and he told me over the telephone that he [fol. 97] would submit those to Mr. Mackay. About a week or two later I heard from him to the effect that I could come down there, and the papers would be executed. At that time I did not meet Mr. Mackay. When I received the papers from Mr. Miller they had been executed. I refer to the exhibits that were introduced here this morning, the agreements retaining me to act in the estates, and the power of attorney authorizing me to go ahead with the claim.

Q. I show you these papers marked Defendant's Exhibit A and B, and ask you whether these are the agreements under which you were retained to appear in both of these estates (hands papers to witness)?

A. Yes, sir. Those are the agreements under which I was retained to appear for the estates. May I make a further remark here?

Q. Yes.

A. As I prepared them the date was omitted, but the date inserted here *are* in Mr. Miller's handwriting.

Q. You prepared the claims for refund in both of these estates, did you not?

A. I did, sir.

Q. You prepared all the papers?

A. I prepared all the papers.

Q. Which of the refunds was first made by the Government?

A. The Duncan Mackay.

Q. Do you recall the amount of the refund?

A. I do not, sir. It was in the neighborhood—it was somewhere about $1,500.

Q. If Mr. Miller testified about $1,600 that testimony is substantially correct, is it not?

A. That is correct. You see in those days there were allowances of interest and sometimes the amount claimed was increased by $1,000 or so.

Q. Did you receive from Mr. Mackay or Mr. Miller the 15 per cent provided for in this retainer relative to the [fol. 98] Duncan Mackay Estate?

A. No, sir.

Q. Pardon me.

A. No, sir. Some time in April, some time in March or April, 1925, Mr. Mackay called at my office at 50 Church Street, and I believe, I well recall the incident, because he stumbled over a chair there, and was assisted to his feet by my stenographer. He told me he had received a letter from Kay & Kay, my former associates, who by that time had ascertained that I had secured that particular bit of business, and who had notified them that if any refund was secured they would hold them liable for any fee paid to me. I told Mr. Mackay at that time that I was the attorney in the case, and that he had retained me, and that any dispute between Kay & Kay and myself was to be adjusted between us. Furthermore I told him when, as, and if a refund were allowed I would be perfectly willing to give him a bond to protect him against any lawsuit that Kay & Kay might bring against him.

Q. You told Mr. Mackay that you would give him a bond to protect the Mackay Estate?

A. Yes.

Q. In the event of a suit against the estate?

A. Yes, but he told me he did not think that proposition would be acceptable.

Q. I show you this paper marked Government's Exhibit No. 1 and ask you whether it is a photostatic copy of the power of attorney which you filed in Washington authorizing you to represent the Mackay Estate (handing paper to witness)?

A. Yes; that is a copy of the power of attorney in the Jennie E. Mackay Estate.

Q. And that is signed by Malcolm Mackay as administrator?

A. Yes.

[fol. 99] Q. Pursuant to that power *at* attorney did you appear for the Mackay Estate in Washington?

A. Yes.

Q. You filed the necessary papers?

A. Yes.

Q. And prosecuted the claims for refund?

A. Yes.

Q. Until they were successfully completed?

A. Yes.

Q. I show you this paper marked Government's Exhibit No. 3 and ask you to tell us the circumstances surrounding that power of attorney?

A. At the time on April 5th or 4th when I notified the Mackay Estate through Mr. Miller that the Jennie Mackay check was on hand at Newark, and that we would have to have a statement from Mackay or some attorney to the effect that there was no income tax liability, I was under the impression that a copy of the power of attorney had been filed with the collector similar to the one that was filed in Washington. I found in going through my records and the correspondence which is on your desk—I don't know whether you introduced it or not, that when I first appeared before the Treasury Department they wrote back to me and told me that they had no record of a power of attorney. This power of attorney that they executed, this Exhibit No. 1, was executed in duplicate. I had no other copy in my files, and I thereupon filed with the Department a duplicate copy of the power of attorney. Consequently, when this question came up of presenting another power of attorney to the Collector I had no copy of the power of attorney that had been filed at Washington. I told my girl who was working for me to make a copy of the power of [fol. 100] attorney and send it to Mr. Mackay's office for execution. Instead of making a copy of the power of attorney she went to the Prentice Service, the Prentice Hall Service, and copied word for word with the necessary changes as to names a form in the Prentice Hall Service, and took it to Mr. Mackay's office. Mr. Miller was not in Mr. Mackay's office that day, April 6th. I had written to him in the Union League Club a day or two before, and

he had told me, that was on Tuesday, that he was going out of town, and he said he would not be back until Thursday. This power of attorney, I am not sure of the date, because it seems to have been changed to the 6th of April, was thereupon filed and the check secured. I did not even read the power of attorney.

Q. This power of attorney is dated April 6th, 1926?

A. Yes, sir.

Q. I show you this letter dated April 5th, 1926, and ask you whether you recognize the handwriting in that letter (handing paper to witness)?

A. Yes; that is the handwriting of John A. Miller, attorney for the estate of Mr. Mackay.

Q. Did you receive that letter by mail?

A. Yes, sir.

Q. From Mr. Miller?

A. I did.

Mr. Turk: I offer that letter in evidence.

The Court: Read that letter.

(The witness reads the letter to the jury.)

(The letter referred to was received in evidence and marked Defendant's Exhibit E.)

[fol. 101] Q. You say that at the time the second power of attorney was signed Mr. Miller was not present?

A. No, sir; he was not. He was in New Jersey or some other place.

Q. And if Mr. Miller says that he was present at the time he is mistaken?

A. He is simply mistaken. He came over and shook hands with me this morning, greeting me as Mr. Kay.

Q. Do you recall going to the office of the Collector of Internal Revenue in Newark and receiving that check for $9,044?

A. I did.

Q. Did you communicate with Mr. Miller immediately after securing that check?

A. Mr. Miller's brother is the secretary to Mr. Mackay. Immediately upon securing the check I telephoned his office, or maybe it was noon on April 7th to the effect that I had the check and would be glad to send the share that was due the estate.

Q. What did they say?

A. They wanted the whole check and would not discuss the matter with me.

Q. Will you give us the entire conversation? Will you give the conversation in your own way, tell us what conversation took place, so that we understand the situation as it really existed?

A. I returned to my office on April 7th at about eleven o'clock with the check issued to Mr. Mackay, and I called up Mr. Mackay. Mr. Miller's brother acted as secretary to Mr. Mackay, and I told him to tell Mr. Mackay that I had collected the check, and that I would be glad to deduct my fee in both estates and send them the difference. About two or three hours later I received a telephone call from the office of Mr. Mackay to the effect that that was not en- [fol. 102] tirely satisfactory and that they wanted the full amount of the check. I told them I had never received the $250 fee in the Duncan Mackay Estate. I felt quite hot about it. I did not think it safe to trust the estate for the $2,500 fee in the Jennie Mackay Estate, and I told them that until they were ready to make an adjustment for my fee and release me from any further obligation I could not see my way clear to give them the whole amount of the refund.

Q. The whole amount of the check?

A. The whole amount of the check.

Q. Do you remember any conversation with Mr. Miller to the effect that the check to be issued by the Government should be issued to you and Kay & Kay jointly?

A. That was even prior to the allowance of the claim, prior to my going to Washington and being sure that the claim would be allowed.

Q. They wanted to have the check made payable to you and Kay & Kay jointly?

A. Yes. I told them that would be absolutely unsatisfactory because Kay & Kay were then at the point of suing each other.

Q. At that time you were not associated with Kay & Kay?

A. No.

Q. When was that?

A. November, 1924.

Q. That was prior to the date on which you were retained?

A. Three months later. Subsequent to that Kay & Kay made independent efforts to get the business, and I made independent efforts. I secured it unfortunately.

Q. Was there ever anything said to you by Mr. Miller or by Mr. Mackay to the effect that they wanted you to adjust the differences which existed between Kay & Kay [fol. 103] and you before they would adjust the item of your fee?

A. Mr. Miller told me on three or four different occasions that unless I adjusted my differences with Kay & Kay he would not pay me my fee, that he had received a letter from Kay & Kay, and that they were undecided what to do about it, and that he considered the liability of the estate to both myself and Mr. Kay, and that he would make no payment to me.

Q. You have maintained right along, have you not, that you had a right to endorse this check?

A. I certainly have. I have been in this business for seven years and have had hundreds of refunds, and never had any case like this come up.

Q. Do you remember the occasion of Mr. Sullivan calling upon you?

A. Yes, sir.

Q. You voluntarily gave him all the information in the form of that statement?

A. I did. I had not pursued my investigation as to what the Mackay Estate people would do to settle the matter because for three or four months prior to that my office was practically closed.

Q. Did you tell Mr. Sullivan of the Secret Service that the only reason you had not sent the check to Mr. Miller or Mr. Mackay was because they refused to take anything less than the full amount?

A. I did.

Q. Do you recall the occasion of the visit to the Collector of Internal Revenue of Newark?

A. Yes.

Q. Who gave you the check in the Newark office?

A. A young lady whose duty it is to pass out refund checks. I do not recall her name.

[fol. 104] Q. Do you recall the gentleman from the Internal Revenue office who testified this morning?

A. I do.

Q. Mr. Wilson. Is that the name?

A. I do.

Q. Did he give you the check?

A. He did not.

Q. Was he present when you received it?

A. He was not.

Q. Who got the power of attorney?

A. He might have seen the power of attorney.

Q. Was that given to the girl?

A. That was given to the girl, yes. I remember quite distinctly that I gave the power of attorney to the girl.

Q. And she gave you the check?

A. She gave me the check. She may have brought that power of attorney in for him to look at it.

Q. But you did not personally give him the power of attorney, nor did he give you the check?

A. He did not. That is not his business.

Q. You signed Mr. Mackay's name on the back of this check, did you not?

A. I did.

Q. You do not deny that you signed it?

A. I signed it in Mr. Buckman's presence.

Q. And this signature Aaron Prussian, Attorney, followed by Aaron Prussian was written by you?

A. Correct.

Q. And all those three names were written in the presence of Mr. Buckman as he testified?

A. Yes, sir.

Q. And you say that you have had hundreds of cases like this with the Treasury Department?

A. Perhaps that is exaggerating. I should say between 150 and 200. No; it would be more than that. In the last seven years I have handled more than that. I had handled more than a dozen this year.

[fol. 105] Q. Where is the money, the proceeds of this check, less your fee?

A. Just at present it is on deposit at the office of Cohen & Harris, the attorneys for my brother for the last fifteen years.

Q. And they are authorized to pay out that money?

A. Yes.

Q. You insist, of course, on payment of your fee out of that amount?

A. Correct; I so indicated in my civil suit pending in this court for the last year.

Mr. Turk: I believe that is all.

Cross-examination.

By Mr. Henry:

Q. You are a graduate of Harvard Law School?

A. Yes.

Q. You studied law there for three years?

A. Yes.

Q. And you took the regular law course along with everybody else there?

A. Yes.

Q. That is a very thorough school, is it not?

A. At that time it was considered one of the best in the country.

Q. It still is, is it not?

A. I hope so.

Q. You are familiar then with law in general, are you not, from your training at Harvard?

A. As much as the average lawyer, I hope. I don't believe, I would not pretend to be familiar with as members of the United States Supreme Court or even the District Court.

Q. Do you remember the occasion when you first met Mr. Miller?

A. Not very clearly, but I think I do. Yes. I do.

Q. You are sure about that now? You remember it? Do you?

A. Yes.

[fol. 106] Q. Mr. Kay was there too, was he not?

A. (Witness hesitates) I believe so.

Q. And together you and Mr. Kay negotiated with Mr. Miller to go ahead with this tax refund?

A. We brought it to his attention at the time, but there were no negotiation, because he said he would have to look in the matter.

Q. You and Mr. Kay were up to his office?

A. Yes.

Q. You had found out, you had found that out from being down in Washington and watching the estate, have you not?

A. No, sir. By the way sir, may I inject a remark here?

That is rather a serious crime. Those Washington records are absolutely and strictly confidential. My source of information are the probate records in connection with the estate.

Q. When was that first meeting with Mr. Miller?

A. Some time in the fall of 1924.

Q. And you were then at that time associated with Kay & Kay, were you not?

A. Yes, sir.

Q. And soon after that you were given authority to go ahead and prosecute the claim?

A. No; five months after.

Q. You were still associated with Kay & Kay then, were you not?

A. No; my association with Kay & Kay ceased three months prior to the date of that power of attorney.

Q. When was the first meeting?

A. October.

Q. Of what year?

A. 1924.

Q. And you got the power of attorney——

A. Three or four months later or five months later, something like that.

Q. You were associated with Kay & Kay then, were you not?

A. No.

[fol. 107] Q. Do you remember testifying a few minutes ago that in November of 1925 you were still associated with Kay & Kay?

A. If I said November, 1925, it was wrong. It should be 1924.

Q. At any rate when you first started with Mr. Miller you were associated with Kay & Kay?

A. Yes.

Q. And you told Mr. Mackay so that day?

A. Yes. I also told everybody by sending cards in January 1925 when I discontinued my association with Kay & Kay.

Q. You knew that by sending a card Mr. Miller could not fire Kay & Kay, did you not?

A. He did not hire him.

Q. You knew that when you went there Kay was with you?

A. We were not hired then. We were told that it would be probably some time before he would let us know.

Q. How much money did you get from Mr. Buckman?

A. The difference between the amount of the check and about $2,100.

Q. In other words you got the sum of $7,000 from him?

A. Yes.

Q. And used that for your own purposes, did you not?

A. No, sir.

Q. You used part of it for your own purposes?

A. No, sir.

Q. None of it at all?

A. No.

Q. Did not Mr. Buckman apply some of it to the moneys that you owed him?

A. I just told him to deduct $2,100 which he applied on the mortgage.

Q. And the rest you did not turn over to Mr. Miller, did you?

A. I offered it to him.

Q. When?

A. On April 7th.

[fol. 108] Q. You mean the day after you cashed the check?

A. Yes.

Q. And when Mr. Miller says he did not know that you cashed the check until six months later he did not tell the truth?

A. I want you to understand that Mr. Miller's memory is rather faulty. By the way that offer was to his brother who was the secretary to Mr. Mackay.

Q. He did not hire you, did he?

A. His boss did.

Q. I thought you said that Mr. Miller hired you?

A. The power of attorney and the retainer was signed by Mr. Mackay. Mr. Miller was acting as Mr. Mackay's attorney, and not mine.

Q. You heard Mr. Miller say that he did not know anything about this check being delivered and the endorsement thereon until the following fall, and it was endorsed by you in the early part of April?

A. I did, and I just read a letter in which he acknowledges a letter of mine in which I told him I was going to get the check.

Q. Your letter did not say that you got the check, did it?

A. No, but he acknowledged my letter.

Q. Where is your letter?

A. It is in evidence or should be.

Q. You say that this second power of attorney that you got, Government's Exhibit 3, and which gives you full authority to receive the check but not to endorse the check in payment of refund and so forth, you took and went over to the office, the Internal Revenue office in Newark, and presented it, and got the draft?

A. I did.

Q. You did not see Mr. Miller that day, did you?

A. No.

[fol. 109] Q. And they did not give you the check before because you did not have the power of attorney?

A. Not because I did not have the power of attorney with me, but because the power of attorney that I thought was on file was not on file.

Q. And you got this power in the meantime and took it over?

A. To file it.

Q. You said that you never read that when Mr. Mackay signed it?

A. No.

Q. You took the trouble of going to New York and getting Mr. Mackay's signature to the document and you did not take the trouble to read the document, although you went all the way back to Jersey?

A. I did not testify to that.

Q. Did you read it?

A. I did not say that I went to Mr. Mackay's office to get the power of attorney. My girl drew it and took it over.

Q. But you went all the way over to Newark and did not read it?

A. I glanced at it myself.

Q. Did you look at it to see whether it was all right?

A. It is a copy of the usual power of attorney. It was only routine.

Q. And you say you did not read it when you went back to Newark?

A. I was not interested.

Q. You do not mean to say that you were going all the way over to Jersey to get the money, and that you took your authority with you without reading it?

A. Well, sir, I have been collecting these checks for a long time.

Q. Will you please answer the question? Did you go all the way to Jersey without knowing what the paper contained or not?

A. I do not recall whether I was over in New York or in Jersey.

Q. You were in New York, were you not? Did you not take this over to Jersey?

[fol. 110] A. I believe that the power of attorney was brought to me in Newark.

Q. Then you went to the Collector's office without knowing what you had?

A. I glanced at it, and found it was a power of attorney, and filed it.

Q. Do you mean to say that you who are a graduate of Harvard Law School did not take the trouble to read the document?

A. I did not read all of it.

Q. You understand legal documents. You are a graduate of Harvard?

A. Yes.

Q. And you did not read this one?

A. Not word for word.

Q. You know all about signing other peoples' names to checks, do you not?

A. Yes.

Q. And yet you did not look to see what authority you had?

A. I assumed that that was the same power of attorney I always had.

Q. You assumed all those things?

A. Yes.

Q. Even though you are a graduate of Harvard Law School?

A. I don't think you are fair in bringing Harvard into this.

Q. I have a right to, Mr. Prussian. Will you take Government's Exhibit No. 2 which I will now hand you and explain to the Court and the jury why you signed Malcolm S.

Mackay's name in small handwriting and why you signed your own name in big handwriting (handing paper to witness)?

A. Yes, sir; I will do that.

Q. Do that?

A. I believe if you will put Mr. Buckman on the stand he will corroborate this.

Q. Explain about the signature on that check?

A. Just a minute. You asked for an explanation and I will give it. I walked to my own home. I was at that time [fol. 111] the father of four children, two of which were twins eighteen months old. My wife *were* sick and the twins were on my lap, and I signed Malcolm S. Mackay. After I signed Malcolm S. Mackay my pen went dry and the nurse brought me another pen, and I signed Aaron Prussian, Attorney, and then Mr. Buckman said "You should sign Aaron Prussian again," which I did. I can't tell whether I signed one with my left hand or my right hand.

Q. And the reason that you give for signing Malcolm S. Mackay's name and the check in small handwriting was because you had the twins in your lap?

A. Yes.

Q. And that cramped your style?

A. That interfered with me. I can't say that it interfered with my style, my handwriting has always been wretched.

Q. You had seen Mr. Mackay's handwriting before, had you not?

A. Yes.

Q. You had seen these various powers of attorney?

A. Yes, but I had none in the file.

Q. But you had seen papers with his signature before?

A. Yes.

Q. And this cramped handwriting is not your usual style, is it?

A. Sometimes it is.

Q. You are a graduate from one of the best schools in the country. Just read on the back of it where you signed Mr. Mackay's name (handing paper to witness)?

A. "Form approved by the Comptroller of the Treasury."

Mr. Turk: Just a minute. May I see that part of the record before the witness reads it.

(Witness hands paper to Mr. Turk who reads it and hands it to the witness.)

[fol. 112] The Witness: "Form approved by the Comptroller of the Treasury January 27th, 1913. This check must be signed in ink or indelible pencil in line below by person in whose favor it is drawn, and must be signed exactly as it is on the face of the check. If the endorsement is made by an 'X' it must be witnessed by two persons who can write and who must give their places of residence underneath."

Q. It says it must be endorsed by the person in whose favor it is drawn?

A. Yes.

Q. And is that a little thing that you did not read in connection with this check?

A. I read that.

Q. And yet you signed somebody else's name on the back?

A. That is the Treasury regulation that it should be signed by the person in whose name it — made. I always understood that a rubber stamp endorsement was not good.

Q. But you signed somebody else's name anyhow? You signed somebody else's name after reading that notice?

A. I signed my client's name on it.

Q. Did you ever write to Mr. Miller telling him that you had obtained this check?

A. I don't recall, sir, I know I telephoned several times.

Q. Did you ever write telling him you had this check?

A. I don't recall. For three or four months my office was closed up.

Q. You did not see Mr. Miller when you obtained this check for a good many months, did you?

A. No, sir.

Q. And yet prior to the time that you got this check you kept in close communication with him, did you not?

[fol. 113] A. No, sir; about once in three or four months.

Q. Did not your lawyer ask Mr. Miller this morning whether you had not kept him informed of this case?

A. When anything happened I informed him.

Q. Except the cashing of this check?

A. I did advise him of the cashing of the check.

Q. But not the signing?

A. I did not inform him of the signing of anything. Most of the things came by telephone. Whenever I informed him anything where there were actual figures concerned he could not remember.

Q. Is it not a fact that after you were indicted over in the Southern District of New York that you offered to settle this case or tried to settle it?

A. No, sir.

Q. Did you no make some attempt to pay the Jennie E. Mackay Estate?

A. I continually made those both before and after I was under indictment.

Q. And the agreement on the part of the United States Attorney that the indictment would be quashed.

Mr. Turk: Just a moment. Your Honor ruled that out this morning. That was the conversation before Judge Goddard, I believe.

The Court: I do not think that it is material, but I have no objection to his making a statement. I understand that his contention is that he said he was ready to pay the money back, and that he offered to pay it back.

[fol. 114] Mr. Turk: If that is your Honor's ruling I will object to the form of the question.

Mr. Henry: I will withdraw the question.

Q. At the time that you were ready to pay this money back were you not under an indictment?

A. I was ready to pay the money back both before and after I was under indictment.

Q. But you did not make any attempt from April 6th to pay Mr. Miller anything at all for six or seven months afterwards, did you?

A. I have said half a dozen times this afternoon that I did.

Q. Not in writing?

A. Not in writing, nor was that power made in writing that you referred to. In fact prior to the time of the indictment we had round table conferences in Mr. Mackay's office with Mr. Miller when the terms of the proposed settlement were discussed.

Q. How many times did you communicate with Mr. Miller?

A. Three or four times.

Q. Was that right after you got this check?

A. What do you mean? I thought you meant throughout.

Q. How many times did you communicate with him after you got the check?

A. Three or four times.

Q. When was the first time?

A. The day after.

Q. How did you communicate with him?

A. By telephone.

Q. Did you tell him you had the check?

A. I did.

[fol. 115] Q. But you did not tell him that you had cashed it?

A. When I say Mr. Miller I refer to his brother.

Q. I am talking about this Mr. Miller. You never communicated with him after you got the check?

A. Just once.

Q. When was that?

A. Some time, I can't tell. Some time in the summer.

Q. This check was obtained and cashed in the spring, in April, early in April, was it not?

A. It was cashed early in April. His brother knew it, and I think within a week I closed my office up for several months.

Q. And you did not communicate with this Mr. Miller until the middle of the summer?

A. I did not communicate with anybody.

Q. Where was he when you communicated with him?

A. Either at the Union League Club or at the office of Mr. Mackay.

Q. And do you recall when it was? Was it in July, August, or in September?

A. I could not say.

Q. You- memory is somewhat hazy on that subject, is it?

A. I can't tell just when it was. I know that he communicated with my office, that my girl who was there had a talk over the telephone with him, and she told me she had a call from Mr. Miller. I believe that was the day before I buried my wife and I did not answer the communication.

Q. And the only communication you had with anybody at all after you had this check was verbal. You never wrote that to anybody?

A. Not that I recall.

Q. That is the only kind of communication that you had with them after you got this check. It was verbal, was [fol. 116] it not?

A. Yes, sir; I should say so.

Q. You did not send a bill for your services to anyone, did you?

A. I did not believe the bill would be paid.

Q. Did you send a bill to anybody for your services?

A. I never did.

Q. And you have never done so up to this time, have you?

A. No, sir.

Q. And you did not write and tell anybody that you collected the amount, and had the check in your custody, and upon receipt of the amount due to you would forward the check, did you?

A. Oh, yes. I wrote to my brother. I had deposited the money with him.

Q. But your brother did not write Mr. Mackay or Mr. Miller or have anything to do with them?

A. He reported to me the depository where that money was.

Q. But he was associated with you in that respect, was he not, and not with Mr. Mackay or Mr. Miller?

A. Yes.

Q. Have you ever been convicted of a crime?

A. No, sir.

Q. You jumped your bail over in the Southern District, did you not?

A. I did not.

Mr. Turk: I object to the form of that question.

The Court: He said he did not. He is bound by his answer.

Q. Was not your bail defaulted over there?

A. Due to the fact that my attorney failed to show up when he was supposed to. Not this attorney. The gentle- [fol. 117] man that represented me over there.

Q. It was due to the fact that you failed to show up was it not?

A. He did not notify me, and the minute I found out I appeared here and furnished——

Q. In the Southern District you did not appear voluntarily, did you?

A. Yes.

Q. Were you not arrested on a bench warrant?

A. Yes.

Q. That was three months after you were under indictment. You were under indictment and did not keep track of the case?

A. I paid my lawyer $1,200 to do that.

Q. But you did not show up on the return day?

A. No.

Q. And you were arrested on a bench warrant, were you not?

A. Yes.

Mr. Henry: That is all.

Redirect examination.

By Mr. Turk:

Q. You appeared whenever you were told to come back, did you not?

A. Yes.

Q. And you appeared here because you were notified that the case was on for trial, did you not?

A. I came 1,600 miles to do so.

Q. And you appeared here whenever it was necessary to appear for pleading, did you not?

A. Yes.

Q. And you appeared here whenever it was necessary to appear here, did you not?

A. I did.

Q. You referred to a Prentice Hall Service from which your stenographer made a copy of the power of attorney. [fol. 118] Will you explain to the jury what Prentice Hall Service is?

A. That is rather hard to explain to a jury of laymen unless they have some knowledge of taxes.

Q. The Prentice Hall Service are the rules prescribed for practicing before the Treasury Department and the decisions of the Treasury Department, are they not?

A. There are so many decisions, five or six hundred a day, that in order to keep in touch with them the Prentice Hall Service runs volumes of one to six hundred pages,

including new decisions coming up, and whenever any information is required one just has to go to the Prentice Hall Service, and it saves the trouble of going over 75 different volumes.

Q. I asked you that question because you testified that the young lady in your office went to the Prentice Hall Service and made a copy of the power of attorney.

A. One of the many forms.

Q. There are several forms of powers of attorney there, are there not?

A. There are a half a dozen. They do not recommend any particular form, nor does the Treasury Department prescribe any particular form.

Q. When you went to get that check at the Newark office Mr. Mackay knew you were going over to get it, did he not?

A. Certainly, sir.

Q. And Mr. Miller knew that the refund had been allowed by the Government, did he not?

A. Yes, but he did not know we were going to get it because he was out of town that day.

Q. But you informed him of the fact that a check was in the Newark office?

A. Yes, several days before.

Q. And you say that the only question between you and Mr. Miller, or between you and Mr. Mackay, was whether [fol. 119] you could deduct your fee first, or whether you were to send the full amount of the check and get your fee from them?

A. Correct. I was told flatly I would never get my fee from them I sent the check.

Q. Did Mr. Miller ever tell you why your fee was never paid in the Duncan Mackay estate?

A. No except that he told me that no fee would be paid.

Q. Did Mr. Mackay ever tell you why your fee was not paid in the Duncan Mackay Estate?

A. No.

Q. At the time you got the check in the Jennie E. Mackay Estate you had received no pay for services whatever in the Duncan Mackay Estate, had you?

A. No, sir.

Mr. Turk: That is all.

Recross-examination.

By Mr. Henry:

Q. You are familiar with the Prentice Hall powers of attorney?

A. Yes, some of them.

Q. You know there are several different forms of powers of attorney?

A. I don't know that.

Q. Did you not testify that the Prentice Hall Service had several forms of powers of attorney?

A. I referred to the fact that any particular form would be all right.

Q. Although you knew there were several different form- in the Prentice Hall books you did not bother to look at the form that your stenographer gave you?

A. I did not bother to do that.

Mr. Henry: That is all.

[fol. 120] By Mr. Turk:

Q. Was there ever any conversation between you and Mr. Mackay or between you and Mr. Miller with reference to the second power of attorney limiting the powers of your first power of attorney?

A. No.

Q. And you acted at all times under the powers given you under that first power of attorney filed at Washington?

A. That is the only one I ever went by.

Mr. Turk: That is all.

Mr. Henry: That is all.

Mr. Turk: That is the defendant's case.

Mr. Henry: I will recall Mr. Miller.

John E. Miller, recalled, having been previously sworn, testified as follows:

Direct examination.

By Mr. Henry:

Q. Can you state definitely whether or not Mr. Prussian communicated with you after April 6th, 1926?

A. He never communicated with me.

Q. And when did it first come to your attention that he had received this check and had cashed it?

A. By accident.

Q. Just tell us how you happened to find it out?

A. I was away most of the summer, and I received a letter from my brother stating——

Mr. Turk: I object to the contents of any letter from his brother.

[fol. 121] Q. Did you after receiving that letter make inquiry about the tax refund in the Jennie E. Mackay Estate?

A. Immediately upon my return in October I went to Newark and was informed——

Mr. Turk: I object to what he was informed.

Q. Did you inquire then about the tax refund?

A. Yes, what had become of the check.

Mr. Turk: I object to any conversation unless it was in the presence of the defendant.

The Court: Do not tell us what the conversation was.

Q. That is the inquiry you made over there?

Mr. Turk: I object to any inquiry that the witness might have had except in the presence of this defendant.

The Court: You will disregard the fact that he went over there and made an inquiry.

Q. You did not know that this check had been cashed until October, 1926?

A. I did not until October, 1926.

Q. Had you been in communication with your brother from time to time that summer?

A. Off and on.

Mr. Henry: That is all.

[fol. 122] Cross-examination.

By Mr. Turk:

Q. You testified this morning that you were present in your office on April 6th when that second power of attorney was signed by Mr. Mackay. Do you recall that

A. April 6th, 1926, I had no office, sir.

Q. You testified that you were present when Mr. Mackay signed the retainer on that day. Do you recall the testimony this morning?

A. That was in 1925.

Q. I am speaking of April 6th, 1926?

A. There was no retainer then, sir.

Q. I beg your pardon. I was referring to that second power of attorney?

A. Yes.

Q. You were present, were you?

A. Mr. Mackay referred it to me before he signed it.

Q. And you are sure that occurred on April 6th, 1926, the date fixed by that power of attorney?

A. The date of the acknowledgment.

Q. And you were present at that time?

A. Yes.

Q. Are you sure of that?

A. Certain.

Q. Pardon. What was your answer?

A. I was present.

Q. I asked you whether you were sure of that statement?

A. Yes.

Q. I show you this letter dated April 5th and ask you whether that letter is in your handwriting. (Handing paper to witness.) Is that your handwriting?

A. That is my handwriting.

Q. Did you send that letter to Mr. Prussian?

A. I sent it to Mr. Prussian.

Q. That paper is Exhibit E?

A. Yes.

Mr. Turk: That is all.

[fol. 123] By Mr. Henry:

Q. That letter was written on the 5th?

A. Yes.

Mr. Turk: That letter is marked Exhibit E, is it. Exhibit E or Exhibit 3? I don't know which.

Q. That was written on the 5th?

A. Yes.

Q. And you say the power was referred to you on the 6th.

A. I think so. Yes. Have you the power there?

Q. Yes.

A. Is that not acknowledged on the 6th?

Q. It is acknowledged on the 6th.

A. All right.

Mr. Henry: That is all. The Government rests.

Mr. Turk: May I for the purpose of the record renew my motion made at the close of the Government's case on the grounds then raised at that time, and upon the additional ground that the testimony clearly indicates that there was no intent on the part of this defendant to commit the crime of forgery.

The Court: I will deny that motion. I will sustain the motion to dismiss as to the second count, and I will leave to the jury just the question as to whether there was a forgery or not.

Mr. Turk: Exception. The defendant moves for a directed verdict.

The Court: That motion will be denied.

Mr. Turk: I respectfully except.

(Mr. Turk closed to the jury.)

(Mr. Henry closed to the jury.)

[fol. 124] CHARGE TO JURY

The Court charged the Jury as follows:

The COURT (MARTINEAU, J.):

Gentlemen of the Jury: This defendant is charged as you have been told with forging the name of the person in whose name the check for $9,044.37 was drawn by the Government. The specific charge is that he forged the name of Malcolm S. Mackay on the back of the draft which had been given to him by the Government. He admits that he signed the name. His defense is that he had authority, and that he honestly believed that he had authority to sign Mackay's name or endorse Mackay's name on the back of this check. That is the issue that you have to decide. The Court has dismissed the second count of the indictment,

so you will deal only with the first count which charges him with forgery by endorsing Mackay's name on the back of this check. Ordinarily if he was employed by Mackay to collect it, that would carry with it the authority to sign Mackay's name. The difficulty arose here on account of the second power of attorney which restricted his authority to the extent that he was authorized to receive it, but not to endorse the check. Now, the issue of fact that you have to decide is did he intentionally sign Mackay's name with the intent to defraud the Government. If that is true, he is guilty. If upon the other hand he signed it believing that he had the authority, only he was mistaken in that belief, then he would not be guilty, if he honestly signed it with that belief.

He starts with the presumption that he is innocent, and that presumption follows him throughout the trial, or until you are convinced from the testimony of his guilt be- [fol. 125] yond a reasonable doubt. Reasonable doubt is not any possible or imaginary doubt, because everything that depends upon human testimony is susceptible of some possible or imaginary doubt. It is a doubt that arises either from the testimony itself or from a lack of the testimony in the case.

The fact that an indictment is brought against him is not a circumstance that you are to consider in determining his guilt. It is simply a method. It raised no presumption of guilt. It is simply a method that the Government has of bringing these charges against these people who it believes to have committed a crime, so that that circumstance is not to be taken as one tending to show his guilt.

You are the sole judges of the credibility of the witnesses and the weight that should be given to their testimony. With that the Court has nothing to do. The Court instructs you as to the law and you determine the facts and return a verdict in accordance with the law and with the evidence.

In weighing the testimony of a witness you will take into consideration his demeanor upon the stand, his manner of testifying, the means of knowledge that he has about the facts about which he testifies, and the interest if any that he has in the case, the reasonableness of his testimony or its unreasonableness, and its consistency with itself or

with the other testimony in the case. Take into consideration any other fact or circumstance which will shed light on the truth or falsity of the witnesses' testimony.

You will take with you to the jury box your common sense, your reason, your judgment, in the light of your [fol. 126] experience in life. The purpose of submitting this testimony to you is to enable you to determine what the truth is with reference to this charge, and return a verdict in accordance with what you think that truth is.

The defendant has testified in his own behalf. He has a right to testify in his own behalf. You have no right to be captious or disregard his testimony. In weighing his testimony, however, you will apply to it the same test that you do in weighing the testimony of any other witness, remembering that he is vitally interested in the result of your verdict. A verdict of guilty would mean punishment. A verdict of acquittal would mean his freedom. If you think notwithstanding his interest in the case that he has testified truthfully you have the right to give that weight to his testimony. There has been testimony about his fee that he claimed he was entitled to in this case, and the fact that a dispute arose over the payment of that fee after he collected the money. If you believe that when he collected the money he collected it without any intention of defrauding the Government, then he is not guilty of a crime. There was a dispute he says between him and his client over the payment of his fee. If you believe that that is source of this trouble, and of this indictment, and that he did not at the time he signed Mackay's name, endorsed Mackay's name upon the check, intend to defraud the Government then he would not be guilty of a crime. In other words, there must be an intent to defraud the Government at the time he endorsed the check. The fact that subsequently a dispute arose between him and his client is not material [fol. 127] except that it might be taken into consideration to show what his intent was when he signed Mackay's name on the draft. Is there anything else?

DEFENDANT'S REQUESTS TO CHARGE

Mr. Turk: I have two requests. I ask your Honor to charge the jury with respect to this statement in the first

count of the indictment that thereafter the defendant unlawfully, wilfully, knowingly, and feloniously obtained possession of said draft.

The Court: What do you want me to charge?

Mr. Turk: I ask your Honor to charge the jury that the Government has utterly failed to prove the allegations made in that respect.

The Court: That request will be denied.

Mr. Turk: I respectfully except. I ask your Honor to charge the jury that in determining whether the defendant acted honestly in endorsing Mackay's name on the back of that check the jury must consider the testimony of Mr. Miller, the attorney, to the effect, that the second power of attorney was not intended to limit the power given by Mr. Mackay to Mr. Prussian under the first power of attorney, but simply to permit Prussian to get the check from the Newark office.

The Court: I think I have covered that instruction. You will take circumstance and that testimony into consideration in determining the intent with which the defendant acted. Take into consideration all the testimony that is offered here in determining his guilt or innocence. If after you have considered all of the testimony you have a reasonable doubt as to his guilt then you are to acquit him. If upon the other hand you have no reasonable doubt as to his guilt you are to convict him.

[fol. 128] Mr. Turk: My last request is that your Honor charge the jury that if they believe the testimony of Mr. Miller to the effect that the second power at attorney was not intended to limit the first power of attorney they must acquit.

The Court: That will be refused. Those instructions are for you to consider along with all the other testimony.

Mr. Turk: I respectfully except. Will your Honor advise the jury that they are not to consider any refusal on any proposition of law, and that that is a matter for the Court.

The Court: You have nothing to do with the law in the case. The Court instructs you as to what the law is, and you are to return your verdict both in accordance with the law and with the facts as you find them.

VERDICT

(The jury retired at five fifteen o'clock P. M. and returned at five thirty with a verdict of guilty against the defendant.)

Mr. Berg: I ask for an adjournment until tomorrow morning for the purpose of making the necessary motions.

Mr. Henry: No objection.

Mr. Berg: Will your Honor continue the defendant under the same bail?

The Court: He could not be continued under the same bond.

Mr. Berg: Will you parole him in my custody?

The Court: It is not customary to do that.

Mr. Berg: It is customary in the Southern District of New York. I can't see what objection there will be to that. [fol. 129] The man is perfectly responsible. He lives in Detroit and he came here especially for this trial. I think we can assure your Honor that it is perfectly safe.

The Court: I think he will have to remain in custody.

Mr. Berg: Will your Honor give us until tomorrow morning to prepare the motions?

The Court: Yes; I will do that.

(Whereupon an adjournment was taken until August 7th, 1929, at ten thirty o'clock A. M.)

August 7th, 1929—10:30 A. M.

Met pursuant to adjournment.

Present: The Court, Mr. Henry, Mr. Turk, Mr. Berg.

MOTION TO SET ASIDE VERDICT

Mr. Berg: The defendant moves to set aside the verdict on the ground that it is against the evidence, against the weight of evidence, and against the law, and on all the exceptions taken during the course of the trial. The defendant also moves for an arrest of judgment on the ground that the indictment does not state a crime under the laws of the United States.

The Court: Motions denied.

Mr. Berg: I respectfully except.

The Court: The sentence of the Court will be $200 fine and five years in the penitentiary.

[fol. 130] GOVERNMENT'S EXHIBIT 1

United States of America, Treasury Department, Washington

[SEAL.]

January 5, 1929.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of the Power of Attorney executed February 27, 1925, by Malcolm S. Mackay, Administrator, Estate of Jennie E. Mackay the originals of which are on file in this Department.

In witness whereof I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary:

(Signed) F. A. Birgfeld, F. A. Birgfeld, Chief Clerk, Treasury Department. (Treasury Department Seal.)

M J.

[fol. 131] No Rec.—I N J. U R.
Rec'd Aug 7 1919. 5 N J. 1 b.

Power of Attorney

To the Commissioner of Internal Revenue, Washington, D. C., and to the Collector of Internal Revenue, Newark, N. J.:

I, Malcolm S. Mackay, Administrator C.T.A. of the Estate of Jennie E. Mackay, have made constituted and appointed, and by these presents do make, constitute and appoint, Mr. Aaron Prussian, of #50 Church Street, New York City, duly registered as an approved agent entitled

to practice before the Treasury Department pursuant to Treasury Department Circular No. 230, my true and lawful attorney for me and in my name place and stead, to represent me and act for me in connection with all matters in any way relating to the Federal Income Tax return filed by me on behalf of said Estate covering the 1919 income tax liability of said Estate, and in particular, to represent me and act for me in prosecuting a claim for refund of a portion or all of said income taxes; giving and granting unto my said attorney, full power and authority to do and perform all and everything requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do if personally present, also [fol. 132] empowering him to receive all official communications, and granting him full power of substitution and revocation, hereby ratifying and confirming all that my said attorney, Mr. Aaron Prussian shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I have hereunto set my hand and seal the 27th day of February, 1925.

Malcolm S. Mackay, Administrator C.T.A. Estate of Jennie E. Mackay. L.B. (L.S.)

(Documentary Stamp.) /C.

State of New York,
County of New York, ss:

On the 27 day of February, nineteen hundred and twenty-five, before me came Malcolm S. Mackay, as administrator C. T. A. of the Estate of Jennie E. Mackay, deceased, to me known to be the individual described in, and who executed, the foregoing instrument, and acknowledged that he executed the same.

Edwin E. Leonhard, Notary Public, Westchester County. Certificate filed in New York County, No. 200, Reg. No. 6204. Commission expires March 30, 1926. (Notarial Seal.)

[fol. 133] GOVERNMENT'S EXHIBIT 2

12-1

"Treasury, Washington, D. C. 784427

Mar. 19, 1926.

Treasurer of the United States

15-51

[SEAL.]

Pay to the order of Malcolm S. Mackay, admr. est. of Jennie E. Mackay, $9,044.37, nine thousand forty-four 37/100 dollars.

Object for which drawn: Refunding taxes illegally collected.

N. P. 1-387. 14342.

J. L. Summer, Disbursing Clerk.

[Endorsements:] Form approved by Comptroller of the Treasury January 27, 1913. This check must be indorsed in ink or indelible pencil on the line below by the person in whose favor it is drawn and the name must be spelled exactely the same as it is on the face of the check. If in- [fol. 134] dorsement is made by mark (X) it must be witnessed by two persons who can write, giving their place of residence in full. (Sign on this line) Malcolm S. Mackay, Admr. Est. of Jennie E. Mackay. Aaron Prussian, Atty. Aaron Prussian. Pay to the order of Bank of Coney Island. J. L. Buckman. [Stamps.] Received payment from the Treasurer of the United States Apr. 8, 1926. 1-120. Federal Reserve Bank of New York. 1-120. Bank of Coney Island S. C. PR. Apr. 7, 1926. P. T., Brooklyn, N. Y. Pay to the order of Federal Reserve Bank of N. Y. Apr. 7, 1926. Bank of Coney Island, Coney Island, N. Y. C. N. J. Macdonald, Cashier. 1-387.

[fol. 135] GOVERNMENT'S EXHIBIT 3

5th Dist. N. J., Collr. Int. Rev., April 6, 1926, Income Tax Div.

Power of Attorney

To the Collector of Internal Revenue, Newark, N. J.:

I, Malcolm S. Mackay (by virtue of letters of administration issued to me as administrator c. t. a. of the estate

of Jennie E. Mackay, Bergen County, N. J.) have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Mr. Aaron Prussian of 50 Church Street, New York City, duly registered as an approved agent entitled to practice before the Treasury Department pursuant to Treasury Department's circular # 230 my true and lawful attorney for me and in my name, place, and stead, to represent me and act for me in connection with all matters in any way relating or pertaining to the income tax return of the estate of Jennie E. Mackay for the year 1918 and in particular in the prosecution of a claim for refund of income taxes paid on account of 1918 income tax liability, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing requisite and necessary to be done in and about the premises and fully to all intents and purposes and I might or could do if personally present.

[fol. 136] Also empowering him to receive and sign all official communications.

Also empowering him and giving him full authority to receive but not to endorse checks in payment or refund in connection with the aforesaid matter, and granting unto him full power of substitution and revocation, hereby ratifying and confirming all that my said attorney, Mr. Aaron Prussian, shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I have hereunto set my hand and seal this Sixth day of Apr. A. D. 1926.

Malcolm S. Mackay. (L.S.)

Sworn to before me this 6th day of Apr., A. D. 1926. Edwin E. Leonard, Notary Public, Westchester Co. Certificate filed in New York County No. 800, Reg. No. 6401. (Seal Edwin E. Leonard, Notary Public, Westchester County.)

[fol. 137] GOVERNMENT'S EXHIBIT 4

Mr. John L. Sullivan, of the U. S. Secret Service, Custom House, New York.

DEAR SIR: The facts concerning the collection of refunds in re Jennie E. Mackay Estate are as follows:

I was retained to obtain the refunds in the Duncan Mackay, as well as the Jennie E. Mackay estates. My employment in connection with the refunds in the two estates mentioned above was followed by written retainers duly executed by Malcolm S. Mackay, administrator in both estates.

In due time and as a result of my professional efforts the refunds were allowed in both estates, and the administrator actually received checks from the Treasury Department. Mr. John E. Miller, the attorney with whom I had my dealings in connection therewith, informed me that he could not comply with the terms of my retainer covering both estates on the ground that Kay & Kay, a firm of Washington attorneys, had filed a claim with him, claiming a share of the said refunds. Thereupon, John E. Miller, the attorney, advised me that he would not pay me for the services rendered in connection with the two estates mentioned above until I had composed my differences, if any, with Messrs. Kay and Kay. So far as Kay and Kay are concerned, the matter has never been adjusted.

During the existence of this dispute between John E. Miller and myself, I, in due course, obtained a refund of [fol. 138] $9224.37. I, thereupon, informed Mr. John E. Miller or Mr. Mackay's office, that I had received the check for said refund and suggested to him that I wanted my fees paid in connection with all the refund matters that I was handling for him as attorney. These matters have never been adjusted and are still pending. Under the terms of my retainer and power of attorney, I contend that I was justified in withholding and using the said check until the other disputes between Mr. John E. Miller and myself had been adjusted.

Jan. 6, 1927.

Aaron Prussian.

[fol. 139] DEFENDANT'S EXHIBIT A

Agreement

In consideration of services rendered or to be rendered by Aaron Prussian, Counsellor on Federal Taxation of New York, New York, in the prosecution of my claim for refund and/or abatement of taxes paid to the United States upon the estate of or by the Estate of Jennie E. Mackay

under the Revenue Act of September 8, 1916, as amended by the Act of March 3, 1917, or the Act of October 3, 1917, or the Act of 1918, or the Act of 1921, or the Act of 1924, I hereby agree to pay to the said Aaron Prussian a fee equal to twenty-five per cent of the amount which may be recovered in the settlement of said claim, and it is further understood that I shall not be liable for or chargeable with any disbursements or expenses incident to the prosecution of said claim.

Dated at New York City, N. Y., February 27th, 1925.

(Sgd.) Malcolm S. Mackay, Administrator C. T. A. Estate of Jennie E. Mackay.

[fol. 140] DEFENDANT'S EXHIBIT B

Agreement

In consideration of services rendered or to be rendered by Aaron Prussian, Counsellor on Federal Taxation of New York, New York, in the prosecution of my claim for refund and/or abatement of taxes paid to the United States upon the estate of or by the Estate of Duncan Mackay under the Revenue Act of September 8, 1916, as amended by the Act of March 3, 1917, or the Act of October 3, 1917, or the Act of 1918, or the Act of 1921, or the Act of 1924, I hereby agree to pay to the said Aaron Prussian a fee equal to fifteen per cent of the amount which may be recovered in the settlement of said claim, and it is further understood that I shall not be liable for or chargeable with any disbursements or expenses incident to the prosecution of said claim.

Dated at New York City, N. Y., Feb. 27, 1925.

Malcolm S. Mackay, Administrator Estate of Duncan Mackay.

[fol. 141] DEFENDANT'S EXHIBIT C

Telephone: Cortlandt 0729.

Aaron Prussian, Counsellor on Federal Taxation, 50 Church Street, New York

January 22, 1926.

Mr. Malcolm S. Mackay, administrator Estate of Jennie E. Mackay, c/o Mackay & Company, 14 Wall Street, New York.

Re Settlement of Refund of 1919 Income Taxes Estate of of Jennie E. Mackay, Schedule It—A—15493

DEAR SIR: You are advised that interest in the amount of $2,247.83 has been determined by the Treasury Department in the above matter. The refund allowed was $6,976.54. The total recovery will accordingly be $9,224.37.

You are further advised that the appropriation for the refunding of income taxes erroneously or illegally collected is exhausted: therefore, the issuance of checks in settlement of refunds cannot be resumed by the Department until Congress makes further appropriations for this purpose.

Yours very truly, Aaron Prussian.

Copy to Mr. John E. Miller.

[fol. 142] DEFENDANT'S EXHIBIT D

Telephone: Cortlandt 0729.
Dict. 4/1/26.

Aaron Prussian, Counsellor on Federal Taxation, 50 Church Street, New York

April 2nd, 1926.

John E. Miller, Esq., Union League Club, 1 East 39th St., New York, N. Y.

DEAR SIR: The Collector of Internal Revenue at Newark, has sent to Mr. Malcolm S. Mackay, Administrator of the Estate of Jennie E. Mackay, the usual routine statement (which is now required to be made by each tax payer to

whom a refund is made) as to there being no outstanding income tax liabilities on the part of tax paying estate.

Of course there are none.

The refund check is in the Collector's Office in Newark, awaiting issue by the Collector upon receipt back by him of the statement to be signed by Mr. Mackay.

Upon telephoning Mr. Mackay's office a few days ago and talking to your brother there, I was informed that Mr. Mackay is at present in the West.

[fol. 143] Pease advise me whether he is expected to return shortly, or whether it will be better to ask his office to forward the blank for execution by Mr. Mackay at his out of town address.

Very truly yours, Aaron Prussian.

AP'M.

DEFENDANT'S EXHIBIT E

One East Thirty-ninth Street,
New York, April 5, 1926.

DEAR SIR: In reply to your of the 2nd would say, that Mr. Mackay is expected at his office today.

I am going out of the City this afternoon, and be back on Thursday for the day.

Yours truly, John E. Miller.

Aaron Prussian, Esq.

[fol. 144] STIPULATIONS BETWEEN ATTORNEYS AS TO CORRECTNESS OF BILL OF EXCEPTIONS

It is hereby stipulated and agreed by and between the parties that the foregoing bill of exceptions is correct in every particular and that it may be duly signed, settled and allowed by the Hon. John E. Martineau, one of the judges of this Court.

Dated Feb'y. 7, 1930.

Howard W. Ameli, Attorney for the Plaintiff. Harold L. Turk, Attorney for the Defendant-Appellant, Aaron Prussian.

In United States District Court

Order Settling Bill of Exceptions

This is to certify that the foregoing bill of exceptions tendered by the defendant is correct in every particular and it is hereby settled and allowed and made a part of the record in this case.

Dated —— —, ——.

John E. Martineau, U. S. D. J.

[fol. 145] In United States District Court

[Title omitted]

Order Extending Time to File Return—Jan. 14, 1930

On reading and filing the annexed affidavit of Samuel Rosenwein, verified the 13th day of January, 1930 and on the stipulation dated the 13th day of January and upon all the papers and proceedings heretofore had herein, it is hereby

Ordered that the time for the defendant, Aaron Prussian, to file his Transcript of Record on appeal and bill of exceptions be and the same hereby is extended to the 15th day of February, 1930; and it is further

Ordered that the August 1929 term of this court be and the same hereby is extended to the 15th day of February, 1930.

Enter.

R. A. Inch, U. S. D. J.

[fol. 146] In United States District Court

Stipulation as to Record

It is hereby stipulated and agreed by and between the parties that the foregoing is a copy of the transcript of rec-

ord of the said District Court on the above entitled matter as agreed on by the parties.

Dated February 7, 1930.

Howard W. Ameli, Attorney for Plaintiff. Harold L. Turk, Attorney for Defendant-Appellant, Aaron Prussian.

In United States District Court

Order as to Record

Upon the above stipulation, it is

Ordered that the foregoing printed record be filed for use by the Clerk of this Court in lieu of the original papers in certifying a record on appeal.

Dated —— —, ——.

John E. Martineau, U. S. D. J.

[fol. 147] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 148] In United States Circuit Court of Appeals for the Second Circuit

United States of America, Plaintiff-Appellee,

against

Aaron Prussian, Defendant-Appellant

Before Manton, A. N. Hand, and Chase, Circuit Judges

Appeal from the District Court for the Eastern District of New York. Defendant was indicated on two counts for violation of Title 18, U. S. Code, § 262 (U. S. C. C. § 148) and convicted on one count. He appeals. Judgment of conviction affirmed.

Harold L. Turk, Esq., Attorney for Appellant. S. Rosenwein, Esq., of Counsel.

Howard W. Ameli, Esq., United States Attorney, Attorney for Appellee. Herbert H. Kellogg, Esq., Emanuel Bublock, Esq., Assist. U. S. Attorneys, of Counsel.

OPINION

MAXTON, Circuit Judge:

Appellant, an attorney at law, was convicted below for falsely forging by endorsement, the payee's name on a draft of the United States giving a refund of income taxes. (Title 18, U. S. Code, § 262; U. S. C. C. § 148.) He was employed to obtain a refund of taxes for the estate of Jennie E. Mackay. His power of attorney dated February [fol. 149] 27, 1925, authorized him to represent his client and act for him—

"in connection with all matters in any way relating to the Federal Income Tax return filed by me on behalf of said Estate, covering the 1919 income tax liability of said Estate, and in particular, to represent me and act for me in prosecuting a claim for refund of a portion or all of said income taxes; giving and granting unto my said attorney, full power and authority to do and perform all and everything requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do if personally present, also empowering him to receive all official communications, and granting him full power of substitution and revocation * * *."

The government granted a refund for $9,044.37 but before delivering the check to the appellant, the government required another power of attorney. It was dated April 6, 1926 and authorized him—

"to represent me and act for me in connection with all matters in any way relating or pertaining to the income tax return of the estate of Jennie E. Mackay for the year 1918 and in particular in the prosecution of a claim for refund of income taxes paid on account of 1918 income tax liability, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing requisite and necessary to be done in and about the premises and fully to all intents and purposes and (sic) might or could do if personally present.

Also empowering him to receive and sign all official communications.

[fol. 150] *Also empowering him and giving him full authority to receive but not to endorse checks in payment of refund in connection with the aforesaid matter * * *.*" (Italics ours.)

The appellant concedes that he received the draft and endorsed on the back thereof: Malcolm S. Mackay (written in fine close hand) Admr. Est. of Jessie E. Mackay (typewritten) Aaron Prussian, Attorney (flowing large hand) Aaron Prussian (flowing large hand). There was also written: Pay to the Order of Bank of Coney Island, J. L. Buckman. Buckman cashed the check for appellant, retaining sufficient to pay a mortgage on appellant's home; and gave the balance to Prussian, a sum stated to be between five and six thousand dollars. It was agreed that the appellant had a 15% contingent retainer to be collected out of the sum refunded.

The defense claimed was that the appellant acted in good faith, believing he had authority to endorse the check and retain his fees and then intended to remit the difference to the estate. But there was evidence given by the attorney for the estate, that he first found out that appellant had endorsed the check about six months after it had been cashed, and during that time he had no communication from appellant and learned of the cashing of the check by chance only. When the appellant was apprehended and questioned by a Secret Service agent of the Government, he offered to make restitution to the government of the amount due, but failed to do so. Whereupon, after a delay of upwards of two weeks, the prosecution was instituted. He never did make restitution to his client.

The statute (U. S. Code, Title 18, § 261; U. S. C. § 147) provides that an obligation or other security of the United [fol. 151] States shall be held to mean a check or draft for money drawn by or upon authorized officers of the United States which have been or may be issued under any act of Congress, U. S. Code, Title 18, § 262 (U. S. C. C. § 148) makes it a criminal offense for one with intent to defraud, to falsely forge, counterfeit or alter an obligation or other

security of the United States. The indictment charged an offense under § 262, Title 18, U. S. Code (U. S. C. C. § 148), pleading the endorsement of the draft by forging the name of the payee, and "that the said draft for money with the said forged endorsement thereon did together constitute a forged obligation of the United States as the defendant then and there well knew, with intent then and there and thereby to defraud". This was sufficient. Hamil vs. United States, 298 Fed. 369 (C. C. A. 5); Alvarado vs. United States, 9 Fed. [2] 385 (C. C. A. 9); United States vs. Jolly, 37 Fed. 108 (D. C. Tenn.) This draft to pay money was an obligation of the United States (Neall vs. United States, 118 Fed. 699 [C. C. A. 9]) and forging the endorsement is punishable under § 148 of the Criminal Code (U. S. Code, § 262). Hamil vs. United States, supra; Alvarado vs. United States, supra.

The endorsement was without authority. The second power of attorney expressly prohibited such endorsement and it is of no importance that the first was more general or did not prohibit in express words such endorsement. Bailey vs. United States, 13 Fed. (2d) 325 (C. C. A. 9) is relied upon by the appellant, but it is distinguishable. There it was held there was no testimony showing that the defendant's authority was in any way specifically restricted under his general authority as attorney at law retained to [fols. 152 & 153] collect a claim. He had authority to receive cash in payment of the claim and he had the implied authority to endorse and cash the check. At bar, there was a studied effort to imitate Malcolm S. Mackay's handwriting, as a comparison of this with his own admitted handwriting shows. Malcolm S. Mackay's name was signed in a small regular handwriting and appellant's name was signed in a large flowing handwriting, showing his habitual signature. It points out by these different signatures, an effort to deceive. To be sure, the appellant made explanation as to this but the jury apparently decided against it.

The court permitted the jury to pass upon the alleged authority, express or implied, to endorse the draft and also whether or not the appellant in good faith believed that he had such authority. The court charged the jury that ordinarily if appellant was employed to collect the draft, that carried with it the authority to sign Mackay's name, but pointed out that the difficulty arose because of the second

power of attorney which restricted his authority to endorse, and while he was authorized to receive it, he endorsed the check. He left it to the jury to say whether or not the appellant intentionally forged the name with intent to defraud the government. This was as favorable to the appellant's case as he could have expected. We cannot reverse the finding of want of authority to make the endorsement. Felder vs. United States, 9 Fed. (2d) 872 (C. C. A. 2); Looker vs. United States, 240 Fed. 932 (C. C. A. 2); Fraina vs. United States, 255 Fed. 28 (C. C. A. 2).

Judgment of conviction affirmed

[fol. 154] In United States Circuit Court of Appeals, Second Circuit

United States, Plaintiff-Appellee,

v.

Aaron Prussian, Defendant-Appellant

Appeal from the District Court of the United States for the Eastern District of New York

Judgment—Filed July 7, 1930

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[File endorsement omitted.]

[fol. 155] Clerk certificate to foregoing transcript omitted in printing.

[fol. 156] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, the briefs and argument to be limited to the question whether the indictment states an offense under the criminal code.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,370. U. S. Circuit Court of Appeals, Second Circuit. Term No. 448. Aaron Prussian, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed September 11, 1930. File No. 35,370.